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In the
Supreme Court of the United States

October Term, 1970

No. [redacted]
242

APOSTOLOS SAMADJOPOULOS,
PETITIONER,

v.

NATIONAL WESTERN
LIFE INSURANCE COMPANY,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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In the

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No.

APOSTOLOS SAMADJOPOULOS,

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v.

NATIONAL WESTERN
LIFE INSURANCE COMPANY,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner prays that a writ of certiorari issue to review judgment of the United States Court of Appeals for the First Circuit, entered in the above entitled case, on March 11, 1970.

Opinions Below

The opinion of the District Court for the District of Puerto Rico is reported at 293 F. Supp. 425 (D.P.R. 1968), printed as Appendix "A", p. 15. This opinion incorporates an Order in the same case, reported at 274 F. Supp. 324 (D.P.R. 1967), printed in Appendix "B", p. 25, and an unpublished Order (D.P.R. filed October 14, 1968), printed in Appendix "C", p. 47.

The opinion of the Court of Appeals for the First Circuit, not yet reported is printed as Appendix "D", p. 55, and also, the Order of the Court of Appeals for the First Circuit dated March 27, 1970, directing that a Petition for rehearing and request for certification under 28 U.S.C. § 1254 (3) not be filed, is printed as Appendix "E", p. 68.

Jurisdiction

The judgment of the Court of Appeals for the First Circuit was made and entered on March 11, 1970, and copy thereof is appended to this petition. The petition of Apostolos Samadjopoulos for a rehearing was not filed, by Order of Court, entered March 27, 1970, and copy thereof is appended to this petition. The jurisdiction of this court is invoked under 28 U.S.C. § 1254 (1) and Rule 19 of the Supreme Court Rules.

Questions Presented

Petitioner and respondent are both intervenors in an *in rem* proceeding commenced by the crew members of the SS TROPIC BREEZE, a Liberian vessel, while in the Port of San Juan, Puerto Rico. Petitioner, master of the vessel, claimed a lien for wages under the laws of the Republic

of Liberia, while respondent, the assignee of a first preferred ship mortgage executed and formalized under the laws of the same country, sought to foreclose its mortgage lien. The District Court, following the traditional conflict of law rules set forth in *Lauritzen* v. *Larsen*, 345 U.S. 571 (1953), applied the law of the flag and allowed the master's wage claim with priority over the mortgagee's claim. The laws of the Republic of Liberia, of which the District Court took judicial notice, granted the master of a vessel the same rights and priorities in regard to wages, as given to the seamen.

The Court of Appeals for the First Circuit, holding that the law of the forum, particularly the Ships Mortgage Act, 46 U.S.C. §§ 951-954, governed *in rem* proceedings in American courts reversed that part of the judgment allowing the lien for wages with priority over the mortgage lien.

The questions presented for review are:

A. Whether the law of the flag, or the law of the forum governs the nature, existence and priority of maritime liens against a foreign vessel seized *in rem* in an American court.

This question necessarily involves the subsidiary of whether a master of a Liberian vessel loses his lien for wages as granted him by the law of Liberia if he seeks to enforce it in an American court; whether that lien loses the priority it enjoys under Liberian law, vis-a-vis a Liberian preferred ship mortgage because enforcement is sought in an American court.

B. Whether the Foreign Ships Mortgage Act, 46 U.S.C. §§ 951-954, as interpreted by the Court of Appeals for the First Circuit, destroys vested rights and priorities granted by the law of the flag of the vessel, and conflicts with established principles of judicial construction of statutes affecting the maritime law.

Necessarily implied and contained in this question is the proper determination of Congressional intent in enacting the Foreign Ships Mortgage Act and whether it intended to borrow only that part of the foreign law regulating the creation and validity of a mortgage but not that part of the foreign law which subordinated that mortgage to a master's lien for wages; whether the statute as interpreted by the Court below conflicts with uniformity principle embodied in the grant of admiralty and maritime jurisdiction in Article III § 2 of the Constitution of the United States; and whether the master's wage claim, assuming the correctness of the interpretation by the Court of Appeals, should have been considered as an "other necessaries."

C. Whether Rule 6 of the Rules of the Court of Appeals for the First Circuit is an effective repeal of Rule 40 of the Federal Rules of Appellate Procedure.

This question embodies the subsidiary question of whether an intermediate appellate tribunal can establish inconsistent rules regarding rehearings and refuse to consider any matter previously presented.

Constitutional Provisions, Treaties Statutes and Rules Involved

The pertinent parts of these are set forth in Appendix F, pp. 69-72.

1. Article III, § 2 (p. 69)
2. Treaty of Friendship Commerce and Navigation, United States and Liberia, 1939 (p. 69)
3. 46 U.S.C. § 951: "Foreign Ship Mortgages" (p. 69
4. 46 U.S.C. § 953: (p. 71)
5. Rule 40 (a), Rules of Appellate Procedure (p. 71)
6. Rule 47, Rules of Appellate Procedure (p. 72)
7. Rule 6, United States Court of Appeals for the First Circuit, (p. 72)

Statement

Petitioner, the master of a Liberian vessel seized by the crew for non-payment of wages due, moved to intervene and assert his claim for wages, double wages under 46 U.S.C. § 596, travelling expenses and other disbursements. The respondent also moved to intervene and foreclose its foreign preferred ship mortgage. The master was allowed to intervene and assert his claims, 274 F. Supp. 324, 326-8 (D.P.R. 1967) and so was the mortgagee. Subsequent thereto, the parties entered into a "Stipulation" for the postponement of the sale of the vessel, whereby respondent assumed the obligation of paying all maritime liens found by the court to have priority over its claim as mortgagee. Pursuant to that stipulation respondent paid the judgments entered on the crew's wage claim, and on the drydock's claim. It contested the master's claims but after protracted litigation on legal issues, since the validity of the claims or the amounts involved were not disputed, the District Court entered judgment allowing the master's claims with priority over the mortgagee's claim, 293 F. Supp. 425 (D.P.R. 1968).

Dissatisfied with the judgment, respondent appealed and the Court of Appeals affirmed part of the judgment but reversed insofar as the wage claim was concerned.[1] It was held that the wage lien in favor of the master was not a maritime lien under the provision of 46 U.S.C. § 953 (a) (2) and, also, that the master's claim "assuming it to be a lien", was not a lien "for wages of the crew of the vessel." The Court of Appeals reached such a result after reviewing the maritime case law dealing with master's wage claims and concluding that under American admiralty law,

[1] The Court of Appeals dealt with the claim for double wages under 46 U.S.C. § 596 and for disbursements and advances together with the wage claim, stating that the priority of each is dependent upon the priority of the wage lien. (Opinion, Note 18, Appendix "D", pp. 63-64).

a master does not have a lien for wages. The opinion says that "in view of this history, it is unlikely that the phrase in question was intended to include masters" (Opinion pp. 11-13, Appendix "D", pp. 65-67).

The District Court had found that under Liberian law, the master had the same rights in regard to wages as the crew and, consequently, had a maritime lien for wages to the same extent as an ordinary seaman; 293 F. Supp. 425-429 (D.P.R. 1968). In applying Liberian law, the District Court relied on *Lauritzen* v. *Larsen*, supra, and several admiralty decisions which had enforced maritime liens created under state or foreign law. The trial court also concluded that it could find no public policy of the forum which would warrant denying the wage lien.

Because petitioner considered that the Court of Appeals had misapprehended the issue as to the choice of law followed and because he felt it would be convenient in having a novel question of statutory construction resolved by this Court, a petition for rehearing and request for certification under 28 U.S.C. § 1254 (3) was timely filed. The Court of Appeals however ordered that the petition not be filed as it violated Rule 6 of the First Circuit Court of Appeals rules.

Reason for Granting the Writ

1. In Deciding That The Master of a Liberian Vessel May Lose His Lien For Wages or Have It Subordinated to a Foreign Ship Mortgage, The Court of Appeals for the First Circuit Has Decided An Important Question of Federal Admiralty and Maritime Law That Is Irreconcilable With a Statute of Congress And Conflicts With Authoritative Decisions of This Court and Other Admiralty Courts.

The Ships Mortgage Act, as amended in 1954, allows the foreclosure of mortgages on foreign-flag vessels in Ameri-

can admiralty courts. The act merely provides a forum in which to foreclose these mortgages which could not be foreclosed in admiralty and the only order of lien priority mentioned is the proviso at the end whereby the mortgage lien is "subordinated to maritime liens for repairs, supplies, towage, use of drydock or marine railway, or other necessaries performed or supplied in the United States." The decision of the Court of Appeals, by equating the foreign mortgage to the mortgage on a United States vessel, has in effect legislated a new scale of relative priorities not contemplated by Congress.

Contrary to the domestic Ships Mortgage Act, the 1954 amendment does not spell out the relative order of priorities that is established in the former. Apart from the proviso, the statute is mute as to the priority to be given by American courts to liens created under the law of the flag-state.

An important question of federal maritime law has been decided inconsistently with the words of the statute. The inconsistency will be elaborated at II, pp. 10-12, infra.

The Court of Appeals also failed to follow the principles of choice of law and the applicable criteria of selection set forth in *Lauritzen* v. *Larsen*, supra. This departure from the accepted and usual course of an admiralty court — "long accustomed to dealing with admiralty problems in reconciling our own with foreign interests and in accommodating the reach of our laws to those of other maritime nations —"[2] is so radical as to call for this Court's exercise of its supervisory powers. In reversing the district court's choice of law and substituting its own choice, not only is the most ancient and venerable of choices rejected but the law which the parties intended to govern and regulate their respective rights and obligations is disregarded. These two considerations were ignored by the Court of

[2] *Lauritzen* v. *Larsen*, supra, at p. 577.

Appeals in its opinion, with the result that if other courts follow it, future litigation between foreign lienors will have to be adjudicated according to the law of the forum. Such a course is judicially unsound and detrimental to our foreign relations. The fortuitous circumstance that a vessel requires routine drydocking at San Juan, Puerto Rico, coupled with the fact that non-payment of wages to the crew becomes intolerable during that brief visit here, is not a factor of sufficient weight so as to warrant the rejection of the traditional selective criteria.

This Court has from its earliest days expressed a desirability of referring to the law of the flag in adjudicating rights created under foreign law, and has recently gone a long way in subordinating the interests of forum legislation to the interests of the flag-state by refraining from extending to foreign vessels legislation of national importance. *The Charming Betsy*, 2 Cranch 64, 118, 2 L. Ed. 208 (1804); *McCulloch* v. *Sociedad Nacional, Etc.*, 372 U.S. 10 (1963); *Benz* v. *Compania Naviera Hidalgo*, 353 U.S. 138 (1957). This Court has found no impediment to enforcing in admiralty a lien created under state law, *The J. E. Rumbell*, 148 U.S. 1 (1893); and neither has the Fifth Circuit Court of Appeals in *Burdine* v. *Walden*, 91 F. 2d 321 (5 Cir. 1937). The precise issue presented in this case — whether the master of a foreign vessel may enforce a liene for wages in an American court — had already been adjudicated favorably in favor of the master by other admiralty courts. *The Estrada Palma*, 8 F. 2d 103 (E. D. La. 1923); *The Olga*, 32 F. 329 (S.D.N.Y. 1887); *The Graf Klot Trantvetter*, 8 F. 833, 837 (D.S.C. 1881); *The Brig Wexford*, 7 F. 674, 682 (S.D.N.Y. 1881); *The Angela Maria*, 35 F. 430, 431 (D.S.C. 1888); *Covert* v. *The Wexford*, 3 F. 577 (S.D.N.Y. 1880); *The Rupert City*, 213 F. 263, 270-1 (D. Wash. 1914); *The Felice B.*, 40 F. 653 (E.D.N.Y. 1889);

The Fort Gaines, 18 F. 2d 413 (D. Maryland 1927); *The Atlanta*, 82 F. Supp. 218, 237 (S.D. Ga. 1948). Thus, the decision of the Court of Appeals in effect conflicts with principles enunciated by this Court and overrules a series of admiralty decisions which have allowed the master of a foreign vessel such lien priority as is established by the law of the flag-state.

The question of what is to determine the rights and priorities of foreign created liens is of importance not only in this case but in all future *in rem* proceedings against foreign-flag vessels in American courts. The indiscriminatory application of forum law to the determination of priority between foreign created liens would probably bring about retaliatory action from other maritime nations with which the United States is engaged in commerce. For example, in determining relative priority between liens created under American law, the foreign tribunal could likewise reject the law of the flag and apply the law of the forum even though the result were contrary to the American law of prioritiees. Furthermore, the holding of the Court of Appeals will result in a violation of Article XIV of the Treaty of Friendship, Commerce and Navigation between the United States and Liberia,[3] to the extent that the master of a Liberian vessel will not have a lien for wages now given to the master of an American flag vessel.[4] A serious problem of international consequences may develop because the United States has entered into similar treaties with many nations.[5] The scope of the present issue surpasses the confines of this particular case and should therefore be reviewed.

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[3] Effective November 21, 1939, U.S.T.S. No. 956, U.S. Stat. at L. vol. 54, pp. 1739, 1745.

[4] 46 U.S.C. § 606 (Public L. 90-293, § 1 (a), Apr. 25, 1968).

[5] *Knauth's*, Benedict on Admiralty, 6th ed. vol. 6, pp. 95-106.

II. In Construing An Act of Congress Regulating Maritime Commerce, The Court of Appeals Has Decided a Novel Question of National and International Importance, Different From The Congressional Purpose and From Established Criteria of Constitutional And Statutory Construction. The Issue Is One That Must Be Resolved By This Court.

This is perhaps the first case to reach the Supreme Court involving the priority of a foreign ship mortgage vis-a-vis a master's claim for wages. It is the only reported decision at the appellate level and at the district court level. There is, however, a case where the Canal Zone District Court granted the master judgment for wages and repatriation but has not been published.[6] The novelty of the question presented calls for adjudication by this Court so that future litigants and admiralty courts can have a guide as to the respective rights of parties involved and the effect, if any, which Congress intended the amendment to have upon their respective liens.

The Court of Appeals has interpreted the statute in question contrary to the Congressional intent. Although the statute is ambiguous as to the order of priority among foreign created liens; the appellate court nonetheless ventures to guess an intent by Congress of recognizing to the foreign mortgage the same order of priority over the liens as given to the mortgage on a United States-flag vessel. Not only is such intent absent from the wording of the statute but it is irreconcilable with the legislative background.[7] The letters of heads of governmental departments

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[6] *Armando Ruiz Ares* v. *SS Colon*, 269 F. Supp. 763 (D.C.Z. 1967), case No. 2830. (Letter of Robert G. Harrel, Deputy Clerk, District Court Canal Zone, printed as Appendix "G", p. 73).

[7] Senate Report No. 1213, 83rd Cong. 2nd Sess. (1954) and House Report No. 1662, 83rd Cong. 2nd Sess. (1954).

consulted, including the Senate and House Reports, are quite clear in emphasizing that the foreign ships mortgage should not have the same order of priority over other liens as given to the domestic ships mortgage and that the statute would be remedial rather than substantive. As a matter of fact, the letter of William P. Rodgers, then Deputy Attorney General, dated February 25, 1954, to the Hon. John W. Bricker, Chairman of the Senate Committee on Interstate and Foreign Commerce, states that in determining priorities the courts are to follow "the established admiralty rules relative to general priorities between maritime liens on foreign vessels which are sold by the courts."

The Court of Appeals failed to consider and follow these "established admiralty rules" and in so doing have interpreted the statute in a manner which conflicts with the uniformity principle embodied in the grant of admiralty and maritime jurisdiction in Article III § 2 of the Constitution of the United States. This Court has from its inception admonished that "an act of Congress ought never to be construed to violate the law of nations if any possible construction remains", *The Charming Betsy*, supra; and to this date has adhered to that principle. *Lauritzen* v. *Larsen*, supra; *Benz* v. *Compania Naviera Hidalgo*, supra, at 147; *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 382 (1958) and *McCulloch* v. *Sociedad Nacional, Etc.*, supra, at 21-22.

Furthermore, the decision of the Court of Appeals and its interpretation of this Act of Congress is contrary to the proper determination of Congressional intent and to the conflict of law doctrines that guide the courts in the application of maritime law. First of all, the reasoning of the appellate court presupposes a Congressional ignorance of conflict of law doctrines and of the applicable criteria of selection set forth by this Court in *Lauritzen* the year before. Such ignorance should not be so readily attributed

to Congress. Also, the opinion of the court overlooks the fact that this statute specifically borrows foreign law in requiring that a foreign ship mortgage must be valid and comply with the requirements of the law of the flag-state. It is unlikely, as a matter of maritime statutory construction, that Congress intended to disregard the criteria of *Lauritzen* and borrow only that part of the law of the flag-state regulating the validity of a mortgage but not that part subordinating the mortgage to other preferred liens.

Finally, if by the Foreign Ships Mortgage Act Congress did intend what the Court of Appeals concluded, then the statute destroys vested rights and priorities granted by the law of the flag-state and would be unconstitutional.

III. Rule 6 of The Rules of The Court of Appeals For The First Circuit Is Inconsistent With Rule 40 of The Federal Rules of Appellate Procedure And Compels This Court, in The Interest of Justice, To Become The Arbiter of Cases That May Be Decided At The Intermediate Appellate Level.

Rule 40 (a) contemplates that parties to an appeal are going to be dissatisfied with the opinion of the appellate court and rather than forcing them to seek review by this court, it provides the opportunity of filing a petition for rehearing. The rule explicitly states that the petition "shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as petitioner desires to present."

On the other hand, Rule 6 requires that the petition contain an introductory statement that the argument or matter was not presented before, together with an explanation why it was not. Rule 40 (a) does not require the statement required by Rule 6 and, not only allows the aggrieved

party to argue points of law or fact that the court "has overlooked or misapprehended", but allows him to present such argument as he desires. By requiring the statement, the Court of Appeals effectively bars the rehearing of issues as contemplated by Rules 40 (a). An attorney is therefore forced into deliberately including a statement on the petition which he knows is false or abandon the hopes of rehearing at the appellate level. It is unlikely that any responsible attorney will follow the first alternative and to follow the second one will result in the loss of his client's case if a petition for a writ of certiorari is not filed.

The Court of Appeals qualified the harshness of Rule 6 by apparently acceding to rehear in the case of "conspicuous error." The difficulty with this concession is that it is illusory because unless the statement is included, the Court will order the petition not filed and therefore it can never know whether "conspicuous error" was committed. Furthermore, how "conspicuous" must the error be before it will dispense with Rule 6? It would seem that the errors which are not obvious to the eye are as much error as the "conspicuous" ones, yet the rule would only favor the latter.

The application of Rule 6 to this particular case was highly prejudicial, not only because rehearing could not be had of a less than "conspicuous errors", but the petitioner, a wage earner, is forced to come before this Court to correct what could have been corrected below. Even if the outcome is not as expected, the rehearing will probably simplify and crystalize the issue and thus reduce the work of the attorney before this Court.

The rule of the Court of Appeals is in conflict with the spirit of Rule 40(a) and violates the directive of Rule 47 of Appellate Procedure. In the interest of judicial efficiency in the administration of justice, review by this Court of the

power of a court of appeals to promulgate local rules inconsistent with the Rules of Appellate Procedure is necessary.

Conclusion

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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APPENDIX A

UNITED STATES DISTRICT COURT,
D. PUERTO RICO
OCT. 15, 1968

RICHARD A. PAYNE ET AL.,
PLAINTIFF,
v.
SS TROPIC BREEZE,
DEFENDANT,
and
APOSTOLOS SAMADJAPOULOS, NATIONAL WESTERN LIFE INSURANCE CO., INC.,
INTERVENORS.
CIV. NO. 453-167.

Nachman, Feldstein, Laffitte & Smith, San Juan, P. R., for plaintiff.

McConnell, Valdes, Kelley & Sifre, San Juan, P. R., for defendant.

MEMORANDUM OPINION

CANCIO, Chief Judge.

The claim of intervenor, Apostolos Samadjapoulos, Master of the SS Tropic Breeze, came up for hearing before this Court on March 8, 1968 for the purpose of determining the amount that he is entitled to recover under the complaint filed by him on August 15, 1967. The defendant, a vessel of Liberian registry, arrived in San Juan, Puerto Rico, on or about June 26, 1967 for routine drydocking. Some days after its arrival, the crew members demanded their wages due, but the Master, due to the owner's failure to provide the necessary funds, was unable to pay them. After stores and supplies had been exhausted and the crew were compelled to endure several days without food, an action *in rem* was filed by them on July 3, 1966.

The Master, nonetheless, endeavored to raise sufficient

funds to pay and feed the crew and release the vessel. He requested money from the charterer but the latter refused to make any advance. He then traveled to New York attempting to get money from the owner. His efforts were unsuccessful and when he realized the hopelessness of the situation, he filed an intervening complaint claiming wages, advances and traveling expenses. Several other parties also intervened in the proceedings claiming maritime liens on the defendant vessel. One of those lienors, National Western Life Insurance Company, Inc., hereinafter referred to as "National" claimed to have a first preferred mortgage lien on the SS Tropic Breeze, which claim was eventually allowed by order of this Court on January 12, 1968.

Because the owners of the vessel did not file a claim, release the vessel and answer the complaint as required by Rules C and E of the Supplemental Rules for Certain Admiralty and Maritime Claims, the Court on September 29, 1967, upon petition of all parties before the Court at the time, ordered the sale of the SS Tropic Breeze.[1] An amended order for the sale of the vessel was subsequently filed and entered on October 4, 1967. The sale would have been consummated in accordance therewith and the proceeds of the sale deposited in the registry of the Court had it not been for a petition by National, in which all other parties joined through a stipulation dated November 1, 1967. Said stipulation provided for National to deposit into the registry of the Court the aggregate amount of all claims that the Court would find to have priority over its claim as mortgagee and to make such deposit within five days after the Court's determination.

Eventually, the mortgagee was permitted to purchase

[1] The only issue as to the sale of the vessel was whether the sale would be with reservation of title on behalf of intervenor Tropical Commerce Corp.

the vessel by bidding the balance due on its mortgage and agreeing to pay all claims that have priority over said mortgage. Said sale was confirmed on January 11, 1968. In other words, National is required to pay according to its stipulation and the order of Confirmation of Sale those claims for maritime liens which the Court finds to have priority over its claim as mortgagee.

As a result of the foregoing, National has objected to and defended against the claims of all other lienors intervening in this case, including that of Apostolos Samadjapoulos. It first objected to the latter's intervention alleging that he did not have a maritime lien for wages and traveling expenses. The objection was denied and the intervention allowed as to all his claims by an order dated September 26, 1967. *Payee et als.* v. *SS Tropic Breeze*, 274 F. Supp. 324, 328 (D.P.R. 1967).

On March 8, 1968, the Court heard the Captain's testimony as to all the matters alleged in the complaint. Documentary evidence consisting of numerous disbursement receipts and the monthly statements of account of the vessel's income and expenses were produced and admitted in evidence and marked as Exhibits 1 to 8, inclusive. Each of these exhibits represent the monthly flow of the vessel's funds beginning in November of 1966 and ending in June of 1967.

These exhibits together with the Master's General Accounts, (Exhibits 1 and 2 at hearing of claim for crew's wages), are the basis for his claim of advances, which, in effect, is a claim for the difference or balance in his favor at the end of the period from an "open account".

He also testified as to his wage claim and other expenses he had to incur as a result of an order of this Court dated after the vessel was under *custodia legis*.

National was the only party opposing all the Master's claims but its opposition consisted solely of cross-examin-

ing him. Although at its request the Court continued the hearing for a later date in order to allow it an opportunity to further cross-examine the witness and to produce proof contrary to his claim, no such proof was ever brought to the Court's attention. On the contrary, it appears from a Stipulation dated April 2, 1968, that National has waived further cross-examination of Captain Samadjapoulos, and admitted the authenticity of certain additional documents which he had brought from New York and which would have been offered in evidence at the hearing, which further substantiate his claim for advances. These documents have also been considered by the Court, as no objection to their admissibility has been advanced by National.

The Court thereafter granted National several more opportunities for bringing a witness from New York and even for taking his deposition in lieu of his testimony in Court, but it failed to produce that witness' testimony. Finally, the Master's claim was taken under advisement pending the filing of memoranda of law on his right to a maritime lien for advances and on the issue of priorities. His lien for wages and traveling expenses were allowed with priority by the order of September 26, 1967, and his lien for advances and disbursements is allowed by the order filed simultaneously with this judgment.

In view of the foregoing orders all of the Master's claims have been allowed, with priority over the mortgage, as a matter of law. Now, after hearing the Master's uncontradicted testimony and reviewing the documentary evidence on record, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Apostolos Samadjapoulos, the intervening plaintiff, is a citizen of the United States of America and a resident of the State of New York. At All times relevant herein he was employed as Captain of the defendant vessel.

2. The SS Tropic Breeze, the defendant, is a vessel flying the flag of the Republic of Liberia and subject to the laws of that country.

3. The intervenor, National Western Life Insurance Co., Inc., is at all times pertinent herein, the holder of a promissory note, secured by a first preferred mortgage on the SS Tropic Breeze, which mortgage was duly executed and registered in accordance with the laws of the Republic of Liberia.

4. Captain Samadjapoulous was employed at New York City in late October 1966 and assumed command of the vessel on November 1, 1966. As Master of the vessel he had several duties and responsibilities, among which was his responsibility for the safety and health of the crew and for the vessel's funds and disbursements therefrom. Every month the owner would provide him with funds, from which he would pay for all of the expenses necessary to maintain the vessel in operation, including crew's wages, food, supplies, stores, repairs and many other necessaries. At the end of each month he would prepare an account of all the funds received and of all expenditures, in the form of debits and credits. If a balance (credit or debit) remained it would be brought forward on the following month's statement of account. This accounting procedure continued from November 1, 1966, until June 30, 1967, at which time the accounts (Exhibits 1 through 8 of Master's claim, Exhibits 1 through 5 of crew's wage claim and Exhibits as per Stipulation of April 2, 1967) reflected a balance in the Masters favor of $8,870.78. This sum, the Court finds to be correct in accordance with the exhibits which the parties stipulated to admit in evidence. Each disbursement entry is supported by a receipt, bill or invoice kept in an envelope together with the statement of account for that particular month.

[1] 5. The Court finds that the owners did not pro-

vide the Master with sufficient funds to pay for all of the vessel's expenses. The largest share of the monthly disbursements went to pay crew's wages, as shown by the monthly statements. As a matter of fact, the November statement (Exhibit 1) shows a disbursement of $9,700 to Captain Barrado, the previous master, for wages due. Additional funds do not appear to have been provided by the owner for this extraordinary disbursement. The remaining disbursements were to pay for necessaries, supplies and repairs for the vessel.

At the end of each month, the Master would send to the owner the Master's General Account (Exhibits 1 and 2 of Crew's wage hearing) and in accordance therewith, would request those funds he had estimated were necessary to meet the expenses for the following month. Funds received were usually less than what he had requested. This situation was the cause for a balance of $8,870.78 in favor of the Master as of June 30, 1967.

Many times an expenditure had to be incurred for which the vessel lacked funds. The Master would then pay for such out of his own personal funds. He testified that such was the traditional practice and custom in the industry in order to assure the vessel's continued operation. He stated that in previous vessels and on the one he is presently serving as Master, the same arrangement exists except that he always is reimbursed. In this case the Court finds that Captain Samadjapoulos, in the best tradition of the sea, has met the standards of a captain's concern for his crew even to the extent of exhausting his personal savings, and becoming personally indebted to others so that his men would not want. His effort and dedication enabled the Tropic Breeze to stay in operation despite the owner's and charterer's neglect, both of whom eventually abandoned the ship and the crew.

The Court finds that Apostolos Samadjapoulos is entitled to the sum of $8,870.78, which amount was actually spent and disbursed by him on behalf of and for the benefit of the vessel.

6. That above amount must be reduced by the sum of $500.00 which he testified to have received from an agent in St. Martin before coming to Puerto Rico in June of 1967, leaving a net balance in his favor of $8,370.78.

7. Captain Samadjapoulos was hired on articles at a monthly salary of $700.00. According to the evidence and his testimony he was paid all his wages except for the month of June. The Court finds that he is entitled to $700.00 as wages for the month of June 1967, and is also entitled to 3 day wages in July 1967, before the vessel was arrested amounting to $69.99.

8. The Master is also entitled to wages for waiting time under the provisions of 46 U.S.C.A. §§596 and 597 for the period of time commencing after the vessel's arrest until he obtained other employment. The vessel was seized on July 3, 1967 and from then until July 21, 1967, when he left the SS Tropic Breeze for another job, he is entitled to recover twice his daily wage rate, or $46.66. For those 18 days waiting time, Captain Samadjapoulos is entitled to the sum of $839.88.

9. Some days before the seizure of the vessel, when the crew had demanded their wages due, he traveled to New York for the purpose of trying to obtain funds from the owner. He expended $121.40 for air travel and $30.00 in expenses. Although the trip was unsuccessful, he is nevertheless, entitled to recover the sum of $150.00 which he expended from his personal funds and which the Court finds reasonable.

10. On July 3, 1967, the vessel was seized and on July 14th, the Master was brought before the Honorable Elmo B. Hunter, sitting by designation, pursuant to a Show Cause

Order dated July 11, 1967. At that hearing, Captain Samadjapoulos agreed to provide the crew with food during *custodia legis*. In compliance with his agreement to the Court and the subsequent Order entered, he gave the crew from his own funds $300.00 to buy food. He is entitled to the reimbursement of this expenditure as an expense of *custodia legis*.

11. At said hearing he also agreed to return to New York to attempt once more to get money to pay and feed the crew. Once again his efforts failed. This trip cost an additional $150.00, which he is entitled to recover, and, which the Court finds to be reasonable.

12. Although unable to raise funds on this last trip to New York, Captain Samadjapoulos was successful in obtaining employment on board another vessel for six crew members and himself. Since these men lacked the funds to pay for their transportation to Baltimore, Maryland, he spent a total of $364.20 of his own funds for air fare. Each one-way ticket cost $60.70. Had he not paid these fares, the costs of maintaining these crew members and the cost of their repatriation, would have been an enormous custodia legis expense. This expenditure was therefore, for the benefit of the administration of the property in the custody of the Court. The amount is reasonable and allowed.

13. The Court finds that the total amount which Captain Samadjapoulos is entitled in accordance with the evidence on record is the sum of $10,944.85.

14. The Court finds that National by stipulation with the parties agreed to pay all such claims as found to have priority over its claim as mortgagee. It is therefore directly liable to the Master for the amount of $10,944.85 which this Court has found to be owed to him by the defendant vessel.

15. Legal interest is allowed on the foregoing amount from July 21, 1967, the last date on which disbursements were made on behalf of the vessel or on behalf of the Court's administration.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties and subject matter.

[2] 2. The Master herein has a maritime lien for all the advances and disbursements made on behalf of the vessel. (Order filed simultaneously with this opinion allowing a maritime lien for advances and cases cited therein.)

[3] 3. Advances made to a vessel to discharge maritime liens, acquire by subrogation the same rank and priority as the lien discharged. (Order filed simultaneously with this opinion and cases cited therein.)

[4] 4. The Master's lien for advances to pay crew's wages had priority over the mortgage claim of National. (Section 7 of the First Preferred Ship's Mortgage, Order filed simultaneously with this opinion and cases cited therein.)

[5] 5. The Master's lien for advances to pay for repairs, supplies, stores and other necessaries, also has priority over the mortgage lien of National. (Order filed simultaneously with this opinion and cases cited therein.)

[6] 6. The Master of a Liberian vessel has the same rights in regards to wages as the crew. Section 298 of Title 22 of the Liberian Code of Laws of 1956, as amended in 1964.

[7] 7. The Master of a Liberian vessel has a maritime lien for wages to the same extent as an ordinary seaman. *Payne* v. *SS Tropic Breeze*, 274 F.Supp. 324 (D.R.P. 1967).

8. Having the same rights as a seaman, the Master of a Liberian vessel is entitled to a statutory compensation under 46 U.S.C.A. §596. *Samad* v. *The Etivebank*, 134 F.Supp. 530 (E.D. Va. 1955).

[8] 9. The Master's maritime lien for wages has priority over all other preferred liens and claims, subordinate only to the expenses of *custodia legis*.

[9] 10. The Master has a maritime lien for traveling expenses. *Payne* v. *SS Tropic Breeze*, 274 F.Supp. 324, 328 (D.P.R. 1967), which lien has priority over the mortgage lien of National.

[10] 11. Having incurred expenses after the vessel was arrested, the Master does not have a maritime lien for such disbursements. However, being incurred for the benefit of the crew, the traditional wards of the Court, this Court will allow the expenditures for food, traveling expenses and repatriation as an expense of *custodia legis* with priority over all other liens and claims. *New York Dock Co.* v. *The Poznan, et al.*, (1927) 274 U.S. 117, 47 S.Ct. 482, 71 L. Ed. 955.

12. The Master is entitled to judgment in the total amount of $10,944.85, with interest thereon at six percent (6%) per annum from July 21, 1967, until paid.

APPENDIX B

UNITED STATES DISTRICT COURT
D. PUERTO RICO
SEPT. 28, 29, OCT. 2, 1967

RICHARD PAYNE, WINSTON BAYLIS, DAVID CAMPBELL, OWEN V. GORDON, ERIC HESLOP, ALFRED JARRIS, SEATON MESSAM, LEOPOLD SMITH, J. SOAMES, C. L. WITTINGHAM, AND DERRICK WILLIAMS,

PLAINTIFFS

v.

SS TROPIC BREEZE, HER ENGINES, BOILERS, FURNITURE, APPAREL, APPLIANCES, APPURTENANCES, EQUIPMENT, ETC.,

DEFENDANT

TROPICAL COMMERCE CORPORATION, APOSTOLOS SAMADJAPOLUS,

INTERVENORS

CIV. NO. 453-67.

Nachman, Feldstein, Laffitte & Smith, Gustavo A. Gelpi, San Juan, P. R., for plaintiffs.

Fiddler, Gonzalez & Rodriguez, Roberto Cordova, McConnell, Valdes, Kelley & Sifre, Abelardo Ruiz Suria, O'Neill & Borges, Edward Borges, Hartzell, Fernandez & Novas, San Juan, P. R., for defendant and intervenors.

ORDER

CANCIO, Chief Judge.

Apostolos Samadjapolus, master of the SS Tropic Breeze, has petitioned leave of the Court to intervene and assert his claim for wages, travelling expenses and advance made on behalf of the vessel.

The Intervenor, National Western Life Insurance Co., has objected to the intervention of Apostolos Samadjapolus, alleging that under the American Maritime Law the master of a vessel has no lien for wages or travelling expenses. The master alleges that the law of the vessel's flag is controlling and that said law gives him a maritime lien for wages.

The objection of National Western Life Insurance brings before the Court the issue of which law applies and whether under the applicable law the master has a lien for wages and travelling expenses. The parties have submitted briefs in support of their respective positions and due deliberation has been had.

The Applicable Law

I

In determining this threshold issue, the Court acknowledges the undisputable fact that the SS Tropic Breeze is a vessel of Liberian Registry and flies the flag of that country. Although the master was hired in New York, his contract of employment, that is, the Shipping Articles (Plaintiff's Exhibit 3), call for the application of Liberian Law. Paragraph 16 of the Shipping Articles provides:

> "16. All right and obligations of the parties of these Articles shall be subject to the Laws and Regulations of the Republic of Liberia."

[1] The right to wages arises out of the Articles and this Court is bound to apply the law which the parties contracted for, unless of course, the application of that law would contravene the laws or the public policy of the forum.

[2] In the maritime field wages have long since been classified among those things better left to regulation by the nation of the vessel's flag, on the basis that to do otherwise would completely disrupt foreign commerce. *Koukorinis* v. *S/T Eurypyle,* 214 F.Supp. 344, 347 (E.D. Va. 1963). The "settled American doctrine" regarding wages and other internal affairs of the vessel was stated by the Supreme Court in *Lauritzen* v. *Larsen,* 345 U.S. 571, at p. 585-586, 73 S.Ct. 921, at p. 930, 97 L.Ed. 1254:

> "And so by comity it came to be generally understood among civilized nations that all matters of discipline, and all things done on board, which affect only the vessel, or those belonging to her, and did not involve

> the peace or dignity of the country, or the tranquility of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged as the laws of that nation, or the interest of its commerce should require."

[3] American Courts have consistently enforced liens for wages in favor of a master when the laws of the vessel's flag gave the master such a lien. The Estrada Palma, 8 F.2d 103 (E.D. La. 1923); The Yarmouth, 1923 A.M.C. 729 (S.D.N.Y. 1923). Even when a state statute allows a lien maritime in nature, admiralty will enforce it. The J. E. Rumbell, 148 U.S. 1, 13 S.Ct. 498, 37 L.Ed. 345 (1893). Federal courts have also enforced wage liens in favor of masters when created by state statutes. The Edith, 217 F. 300 (D.C. Wash. 1914); The Laurel, 113 F. 373 (D.C. Wash. 1902); *Burdine* v. *Walden*, 91 F.2d 321 (5th Cir. 1937). The statutory law of Puerto Rico grants the master such a lien, Title 10 App. L.P.R.A. §562(6), 566, and this court has enforced it. *Prentice* v. *The Verita*, Adm. 1-59, U.S. District Court for the District of Puerto Rico (unreported). The Court can find no impediment in the American Admiralty and Maritime Law to deprive the master of a lien for wages given by the law of the vessel's flag.

In view of the foregoing the Court holds that the Law of the Republic of Liberia is applicable.

The Law of Liberia Recognizes A Lien For Wages In Favor Of The Master

II

[4] Prior to August 18, 1964, the law or Liberia did not give the master of a vessel the protection regarding wages afforded to the crew. Thus, in The Arie H, 1963 A.M.C. 1595 (D.C. Ga. 1963), the master of a Liberian vessel was denied a lien for wages. After that decision the law was amended in April 23, 1964, effective August 18, 1964, and

Section 298 was added to Title 22 of the Liberian Code of Laws. Section 298 of Title 22 provides:

> "Except as otherwise provided, the Master of a Liberian vessel shall have the same rights in respect to wages, maintenance and cure and repatriation as hereinafter provided in respect of seamen.

Under this section the master has the same rights regarding wages as the crew and among those rights include a lien for wages. Section 336(4) of Title 22 of the Liberian Code of Laws reads as follows:

> "Section (4) — The seamen shall have a maritime lien against the vessel for any wages due him under this section."

The wage lien is so jealously guarded by the Liberian Law than an absolute prohibition against agreement forfeiting said lien is established in Title 22, Section 334 of the Liberian Code of Laws.

> "No seamen shall by any agreement forfeit his lien upon the ship or be deprived of any remedy for the recovery of wages to which he should otherwise have been entitled; and every stipulation by which any seamen consents to abandon his rights to his wages in the case of the loss of a ship or to abandon any right which he may have obtained in the nature of salvage shall be wholly void and inoperative."

Finally, the wage lien is recognized to have the highest priority in section 113 of Title 22 of the Liberian Code of Laws.

The Liberian Law recognizes that the master has a lien for his wages and this Court must enforce it in accordance with the doctrine stated in *Lauritzen* v. *Larsen, supra.*

The Master's Lien For Travel Expenses

III

[5] National Western also objects to the master's intervention as regards his claims for travelling expenses

allegedly incurred on behalf of the vessel, on the basis that such expenses do not create a lien upon the vessel.

The Court finds that the master travelled to New York for the purpose of seeking the necessary funds to pay the crew, Puerto Rico Drydock and other expenses. Because the ship had no funds, the master had to pay for the travelling expenses out of his personal funds. The purpose of his trip was to obtain funds, which were to meet certain operational expenses of the vessel. His failure to travel would have been a violation of the duties imposed on a master by the Liberian law in Section 296 of Title 22 of the Liberian Code of Laws.

"(d) to assume full responsibility for the safety of the members of the crew."

"(f) to assume full responsibility for the vessel's funds and the disbursements thereof."

[6] The success or lack of success is not the determinative factor. Travelling expenses have been recognized as constituting a lien upon a vessel. In The Egeria, 294 F. 791, 794 (9th Cir. 1924) the court upheld the allowance by the District Court of a lien for travelling expenses from Portland to San Pedro for the purpose of obtaining funds to release the vessel. In The Ascutney, 278 F. 991, 992-993 (D.C. Maryland 1922) the court allowed the master's taxi expenses even though he could have used a streetcar; and in The Artemis, 53 F.2d 672, 676 (S.D.N.Y. 1931), taxi cab fare for conveying provisions to the crew were allowed. This court will also allow the travelling expenses incurred by the master when attempting to obtain funds to pay the crew's wages.

No objection has been interposed to any of the other claims in the master's intervening complaint.

In view of the foregoing the opposition of National Western is denied and the Motion for Leave to Intervene of Apostolos Samadjapolus is hereby granted.

ORDER FOR THE SALE OF THE SS TROPIC BREEZE

The defendant vessel has been adjudged in default. The plaintiffs have petitioned the Court, pursuant to Rule E(9)(6) of the Supplementary Rules for Certain Admiralty and Maritime Claims to order the sale of the vessel, alleging that the custodia legis expenses were increasing and if allowed to continue indefinitely, would probably absorb the proceeds of the sale. Puerto Rico Drydock and Marine Terminals, Inc., the custodian appointed by order of the Court, has filed a Statement of Expenses, from July 3, 1967 to September 8, 1967, showing the total expenses as of that date to be $8,195.31. Said custodian also filed a schedule of the estimated daily expenses of custodia legis. All the appearing parties agree on the necessity of having the vessel sold within the shortest time possible in order to minimize the custodia legis expenses. The court would have no hesitancy about ordering the sale were it not for the objection of the Intervenor, Tropical Commerce Corp. to the sale unless it were subject to reservation of Tropical Commerce Corp.'s alleged title in certain equipment installed aboard ship, fuel oil and cargo still on board the vessel. The plaintiffs and the other intervenor's opposed the sale subject to any reservation of title as suggested, and, instead, contend that the property claimed by Tropical Commerce Corp. is part of the vessel and subject to their maritime liens for wages, repairs and for foreclosure of a preferred ships mortgage. Thus, they are asking for the sale of the vessel together with the property presumably [1] belonging to Tropical and without any reservation of title.

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[1] For the purposes of this issue, the parties have filed their respective briefs assuming (but not accepting) that the property involved is legally owned by Tropical. The Court does not reach the question of legal title.

Tropical Commerce Corp. has advised the Court that it no longer seeks the removal of said property and that it does not oppose the order of sale. Its position now is that the judicial sale can not validly convey title of the property to the purchaser of the vessel. This new attitude assumed by Tropical Commerce Corp. hardly differs from that requesting removal, for in either case, the Court must ultimately determine whether the equipment is part of the vessel and liable to the maritime liens. If it is, then neither removal nor reservation of title can be allowed. Therefore, the issue before the Court is whether the property allegedly belonging to Tropical Commerce Corp., the fuel oil and cargo on board the SS Tropic Breeze must respond for the maritime liens of plaintiffs and other intervenors. In deciding the issue a review of certain facts is necessary.

The Cement Equipment

I

Tropical Commerce Corp. had time-chartered the SS Tropic Breeze for a period of 30 months, with an option to purchase the vessel at the expiration of the term; pursuant to the charter party, the owner allowed the charterer the privilege of installing on board certain cement loading bagging and discharging equipment.[2] By virtue of clause 34, the owner recognized that the "equipment shall always remain the property of the charterers"; only on condition that "on redelivery of the vessel to the Owners, Charterers to make the necessary restorations resulting directly from the installation of this equipment". If the controversy were exclusively between the owner and the charterer, the latter would have an absolute right to this equipment, provided of course the necessary restorations were made.

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[2] Charter Party between Southern Seas Shipping Corp. and Tropical Commerce Corp. (Tropical's Exhibit #1).

However, the controversy here is between the charterer and the maritime lienors.[3]

The court has heard substantial testimony and has had the benefit of visually inspecting the vessel and the cement equipment, which consists of a bagging apparatus, generators, central control system, heavy rubber conduits and movable suction pumps. The largest part, the bagging apparatus, is welded, riveted and bolted to the aft hold and extends upward to a height of over 25 feet. The operating energy is provided by generators and the central control system located in another compartment. The bases are welded and bolted to the deck of that compartment. Heavy insulated cables that cut through the bulkhead connect the control system to the bagging apparatus. Numerous conduits extend from the bagging apparatus into the various holds, where the pumps to suction the bulk cement are attached. The equipment has no name-plate, property tag, marking, engraving, painting or other notice to indicate ownership by Tropical Commerce Corp. It was installed between June and August of 1966. The installation costs were over $138,400. To remove it today, although not impossible, would be a costly operation, the estimates in the record ranging between $25,000 and $100,000.

This equipment, although not required nor useful in the navigation of the vessel, has nevertheless completely transformed her from a dry cargo carrier into a bulk cement carrier. Without this equipment, her purpose or voyage, i.e., the transportation of bulk cement, could not be accomplished. The Witch Queen, D.C., Fed.Cas.No.17,916. In The Frolic, 148 F. 921, at p. 922 (D.C.R.I.1906), the Court held:

> "But where such instruments are supplied on account of the owners of a vessel, as a necessary part of her equipment for a special service, then it seems to me

[3] The various lienors are claiming wages, repair and supplies, advances and cargo damage.

that they should be regarded as appurtenant to the ship, and as included in the term 'ship' or 'vessel.' "

Thus, the cement equipment is appurtenant, necessary and indispensable to the vessel's operation and trade as a bulk cement carrier. The vessel is unique and its value to a potential purchaser is, in great measure, this uniqueness.

[7, 8] The fact that the property is owned by the charterer and not the shipowner does not prevent maritime liens from attaching. As Judge Dooling recognized in *United States* v. *F/V Golden Dawn*, D.C., 222 F.Supp. 186, at page 188:

> "It may be that the 'preferred maritime liens' of 46 U.S.C.A. § 953, or some of them, attach even to leased equipment; they enjoy something more than or, rather, different from bare priority of rank and derivation from the general-owner interest; their origin (See, e. g. The Rebecca, D.C.Me.1831, 20 Fed.Cas. 373 (No. 11,619) and see on notice particular, pp. 381-382, cf. The Philomena, D.C.Mass.1911, 200 F. 859, 861) makes it unsurprising that they tend toward reaching every sort of interest in the congeries of vessel, tackle, apparel, and furniture that has been committed to the hazard of the vessel's voyages and enterprise without regard to ownership and subdivisions of ownership interests." (citations omitted)

The charterer's equipment was also committed to the hazard of the voyage and enterprise and, consequently, is subject to maritime liens regardless of ownership and subdivisions of ownership interests.

This rule is not an innovation of the court. In The Hope, 191 F. 243 (D.C.Mass. 1911) an engine and a net fixed to the hull of the vessel were held to the parts of the boat for the purpose of satisfying a supplier's lien, even though owned by a third party. In The Paraiso, 226 F. 966 (W.D. Wash. 1915) oil tanks belonging to the charterer were held

to be a part of the vessel in a limitation proceeding. In The Augusta, 15 F.2d 727 (E.D.La.1920), wireless equipment rented to the ship under a license agreement, was held to be part of her equipment and subject to a lien for collision damages. The same result was reached in The Katherine, 15 F.2d 387 (E.D.La.1926) where the radio equipment was installed under a chattel mortgage.

The Showboat, 47 F.2d 286 (D.C.Mass.1930), leased fire extinguishers were held to be subject to a maritime lien. The court in *First Suffolk National Bank of Huntington* v. *The Air Brant*, 125 F. Supp. 709 (D.C., 1954), refused to allow the removal of loaned property and of that acquired under a conditional sale agreement, holding at p. 710 as follows:

> "This court is now asked by these two parties to be allowed to remove the above-mentioned essential items of equipment from the vessel prior to the marshal's sale. The effect of this, if successful, would be to reduce materially the prospective bids of potential purchasers at the marshal's sale. In any event, all of the above items are essential to the navigation and operation of these vessels as fishing vessels, and being part of the res, are subject to process in rem regardless of title." (citations omitted)

More recently, in *United States* v. *F/V Sylvester F. Whalen,* 217 F.Supp. 916 (D.C.Maine S.D.1963) a group of maritime lienors successfully opposed the intervention of a lessor seeking reservation of title to a fathometer and radar leased for use in the vessel.

But the case most directly in point is *Turner* v. *United States,* 27 F.2d 134 (C.A. 2 1928) where the facts considered by the court were analogous to those present before this Court, and where it is stated at page 135:

> "The Zero was under time charter to the appellant for many years. She had been operated as a refriger-

ating vessel, and was engaged in carrying meat cargoes from South America to British ports. The refrigerating plant was installed in 1896, and remained in the vessel, until the time of collision in 1922. It consisted of refrigerating machines, pumps installation, pipe lines, and was physically attached to the vessel. Under the terms of the charter, the machinery and insulation were to remain the property of the charterer, and to be removed by it and the vessel restored to its original condition under (sic) the termination of the charter. It is obliged to share the losses, because the Zero was at fault, and the refrigerating system and the vessel are claimed to be one. Its value was wholly incident to the ship and for its use, and it was a necessary appurtenance to the ship's business."

The court, at page 136, went on to conclude that:

"The courts do not permit a division of the res when it is made answerable for torts committed by the vessel, and though there may be separate ownership of the refrigerating plant, as between the parties to the charter, it is a part of the vessel, to which those suffering damages are entitled to look for reimbursement for torts committed by the vessel."

That decision has been folled and recognized as the definitive expression of the applicable law.[4]

[9] Although the lien in *Turner* arose out of a collision, while here the liens arise out of maritime contracts, there is no logical basis for drawing a distinction between different classes of lienors with respect to the appurtenances or properties aboard the vessel. The charterer here has asserted that the rule is applicable only in collision case. No reason has been presented for so limiting its application.

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[4] *First Suffolk National Bank of Huntington* v. *The Air Brant*, supra, 125 F.Supp. at p. 710; *United States* v. *F/V Sylvester P. Whalen*, supra, 217 F.Supp. at p. 917; and *United States* v. *F/V Golden Dawn*, supra, 222 F.Supp. at page 189.

At least some liens arising from maritime contracts such as liens for wages would appear to be entitled to greater protection than liens arising from maritime torts. In this case, where there has been no labeling, separation, identification, or other notice, the contract lienors were entitled to rely on the presence of the appurtenances or other property as ship's property when they contracted with the vessel. The tort lienor does not rely on a vessel's value since his lien usually results from a sudden occurrence with no prior notice.

[10] There can be no question that insofar as the lien for wages of crewmen, the equipment should respond. According to Gilmore and Black, after custodia legis expenses are paid, claims by seamen for wages have the highest priority among maritime liens.[5] Since the equipment in this case is not distinguishable from the case where it belonged to a lessor, ballor, chattel mortgagee or conditional sales vendor; and since the wage lien is of a higher priority than that of a collision victim, the Court cannot accept the suggested distinction.

The Court is aware of decisions[6] reaching apparent results different from the views expressed herein, but in each of these cases the facts and circumstances were distinguishable from the facts herein. To whatever extent the results therein may be in conflict with this opinion, this Court respectfully disagrees.

What has been said so far would ordinarily dispose of the controversy were it not for the charterer's allegation

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[5] Gilmore and Black, The Law of Admiralty, 1937, Ed. at page 696.

[6] *The Merrimac*, 29 F. 157 (D.C.Mass. 1888); *The Hirondella*, 21 F.Supp. 223 (S.D.Ala. 1937); *Learned* v. *Brown*, 94 F. 876, (5th Cir. 1899); *The Showboat*, 47 F.2d 296 (D.C.Mass. 1930); *National Bank of Commerce* v. *The John T.*, 1949 A.M.C. 328 (D.C.Wash. 1947); *San Diego Trust & Savings Bank* v. *Linda Lee*, 1949 A.M.C. 324 (S.D.Cal.1947).

that the *Golden Dawn*[7] decision is a "binding precedent controlling the claim of the mortgagee, National Western Life Insurance Co., *vis a vis* the rights of Tropical."

[11] The decision is highly persuasive and this Court would be inclined to follow it if presented with like facts and circumstances. But the facts are not apposite. For example, the lease in *Golden Dawn* was prior to the mortgage and the equipment lessor was very careful in attaching its name plate and property tag, which stated that even if the sounding equipment was a functionally integral part of the vessel, it was not subject to a mortgage. No such precaution was taken by Tropical Commerce Corp. nor did it obtain permission from the mortgagee prior to installing the equipment even though aware of the existence of the mortgage and of the terms thereof. The mortgage now held by National Western included:

> "The whole of the vessel, together with all of the boilers, engines, machinery, masts, spars, sails, rigging, boats, anchors, chain, tackle, apparel, furniture, fittings and equipment and all other appurtenances thereto appertaining or belonging and appropriated to the exclusive use of the vessel, whether now owned or hereafter acquired, whether on board or not, and all additions, improvements and replacements hereinafter made in or to the Vessel (except leased equipment not belonging to the shipowner)."[8]

The cement equipment does not fall within the category excluded from the extent of the mortgage, and the holding of the *Golden Dawn* thus becomes inapplicable to the fact herein. The more analogous situation is presented in *United States* v. *F/V Sylvester P. Whalen*, supra, and this Court will follow Judge Gignoux's well reasoned opinion in deny-

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[7] *United States* v. *F/V Golden Dawn*, supra.

[8] First Preferred Ship Mortgage, April 20, 1966, page 2. (National Western Life Insurance Co., Intervening Complaint, Exhibit 1.)

ing the petition for reservation of title, even as against the mortgagee.

For the foregoing reasons the petition of Tropical Commerce Corp. to reserve title is hereby denied.

THE FUEL OIL

II

When the SS Tropic Breeze arrived in San Juan, Puerto Rico, she was laden with approximately 150 tons of Bunker-C fuel oil, which Tropical Commerce Corp. claims it owns. Title is asserted under the provisions of the charter party by which the charterer was required to pay for all the fuel consumed by the vessel. The charterer requests that the sale be made with notice of its rights to title to the fuel oil. All plaintiffs and most intervenors have opposed, claiming that their liens extend to the fuel oil.

[12] Assuming, once again, that Tropical Commerce Corp. is the legal owner of the fuel oil, the Court, nevertheless, finds that the fuel oil is part of the vessel, its tackle, boilers, engines, etc. Without it, the vessel cannot move and, consequently, it becomes necessary and indispensable to the vessels navigation. In *Moore* v. *Martine Marine Transp. Co.*, 177 F.2d 561, 563 (4th Cir. 1949) the Court of Appeals upheld the District Courts conclusion that:

> "The bunker fuel oil laden aboard the Steam Tug P. F. Martin at the time she was sold by the United States Marshal for the Eastern District of Virginia constituted a part of said vessel, its tackle, apparel, furniture, etc."

That conclusion was affirmed on authority of The Augusta, supra, The Katherine, supra and *Turner* v. *United States*, supra. In view of the foregoing the petition of Tropical Commerce Corp. to reserve title to the fuel oil is denied.

THE CARGO

III

[13] Tropical Commerce Corp. also wants the vessel

sold subject to its rights and title in the cargo aboard the SS Tropic Breeze, consisting of approximately 416 tons of dry Portland cement in bulk and approximately 20,000 bags. The other parties in this action admit that cargo is generally not subject to maritime liens, *Clifford* v. *Merrit, Chapman* v. *Scott Corp.*, 57 F.2d 1021 (5th Cir. 1932); *Sheppard* v. *Taylor*, 5 Peters 675, 8 L.Ed. 269 (1831). However, a further hearing must be held to determine whether the charterer owes freight or charter hire as claimed by the plaintiffs, because if charter hire or freight is owed to the shipowner, the wage claim lienors may proceed against the cargo or the proceeds of the sale of the cargo. *Clifford* v. *Merrit, Chapman & Scott Corp.*, supra; *Poland* v. *The Spartan*, 134 FedCas.No.11246, p. 912.

To preserve the rights of all parties, the Court orders that the sale of the cargo shall be separate from the sale of the vessel and its appurtenances, and the proceeds of the sale of the cargo shall be deposited in the Registry of the Court in a separate fund. The notice of sale shall provide for this separate sale of the cargo with the offloading thereof to be at the expense of the purchaser.

The following shall be

IV
THE FORM OF THE ORDER OF SALE

1. The vessel shall be sold together with the cement equipment and the fuel oil but without the cargo.

2. (a) The notice of sale shall inform the prospective purchasers that the vessel includes the cement equipment and fuel oil and that the purchaser will acquire title to the vessel, equipment and fuel oil, free and clear of any liens, mortgages, or claims of any person.

(b) The notice of sale shall also advertise a separate sale of the cargo of bulk cement and bags with the cost of removal of the cargo to be borne by the purchaser thereof.

3. The notice of sale shall be published in a newspaper of general circulation within this District, at least four times during the fifteen days preceding the sale. The notice shall specify the date, time and place where bids shall be received. Any party may, at its own expense, publish the notice of sale in any newspapers or other news media, outside the District, provided said notice conforms with this Order.

4. The sale shall be conducted by the United States Marshal for the District of Puerto Rico at his office in San Juan, Puerto Rico, on the 17th day of October, 1967, at 2:00 o'clock in the afternoon of said date.

5. The vessel shall be sold to the highest bidder for cash or certified check subject to the approval of the Court.

6. The cargo shall be sold to the highest bidder for cash or certified check subject to the purchaser's removal of the cargo within one week from the sale, unless the purchaser of the cargo is the same entity or person that purchases the vessel. Failure to remove the cargo within the period specified shall operate as a forfeit of his purchase price.

It is so ordered.

ORDER

The plaintiffs, Richard A. Payne, et al., are claiming statutory wages under section 596 of Title of U.S.C.A.[1] The Intervenor, Tropical Commerce Corporation, has objected to the seamen's claim for double wages. No other intervenor has filed any memorandum, in opposition to the seamen's claim. A brief recital of the facts must be made before reaching the legal question.

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[1] The pertinent text of 46 U.S.C.A. § 596 reads: "Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the court."

The SS Tropic Breeze, a vessel flying the flag of the Republic of Liberia, arrived in Puerto Rico on or about June 26, 1967, for the purpose of undergoing routine dry-docking repairs pursuant to the owner's instructions. Some days after arriving in San Juan the seamen in accordance with the terms of their contract of employment,[2] demanded of the master their wages due, which at that time, according to him, amounted to less than $1500, excluding the wages of two engineers who had not been paid for the previous two months in order to build a reserve or savings. The master did not have the funds to meet this demand so he telephoned the owner's agent, Northwestern Agencies, Ltd., which operated the vessel. He talked with the manager, Mr. Skourles, who after being advised of the crew's demand and the lack of food, promised to send the necessary funds immediately. When these did not arrive the master tried to have Tropical Commerce Corporation, the charterer, advance the funds but had no success. At last he went to New York to obtain the money, but was only able to obtain more promises.

In the meantime the crew was without food or money. After four days of involuntary abstinence and with no relief in sight, they sought the services of counsel who on July 3rd filed a complaint and caused the vessel to be arrested. Arrangements were made with the Salvation Army, whose officers assumed the neglectful shipowner's duty of providing the crew with food. Despite the master's efforts the plaintiffs' wages still remain unpaid. The shipowner has failed to claim the vessel or answer the complaint and default has been entered.

[14, 15] The court finds that on June 30, 1967, upon the owner's failure to pay the wages due, the contract of

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[2] Articles of Agreement Between the Master and Seamen in the Merchant Service of the Republic of Liberia: (Plaintiffs exhibit #3) Paragraphs 2, 3, 5 and 6.

employment was breached and the seamen was entitled to be paid off in full and repatriated to their country of origin.[3] Whether statutory penalties will be awarded by a Court in a situation such as the present one depends upon the circumstances for withholding the payment of the wages due.

Section 596 of Title 46 U.S.C.A. requires that there be a *refusal* or *neglect* and that it be *without sufficient cause.* The evidence and testimony before the Court shows that payment of the wages was refused or neglected within the meaning of the statute. The only question for determination by this Court is whether the refusal or neglect was without sufficient cause.

[16] The term "without sufficient cause" has been defined by the Supreme Court of the United States in *Colle* v. *Fergusson,* 281 U.S. 52, 56, 50 S.Ct. 189, 191, 74 L.Ed. 696 (1930) as follows:

> "The words 'refuses or neglects to make payment * * * without sufficient cause' connote, either conduct which is in some sense arbitrary or willful or at least a failure not attributable to impossibility of payment. We think the use of this language indicates a purpose to protect seamen from delayed payments of wages by the imposition of a liability which is not exclusively compensatory, but designed to prevent, by its coercive effect, arbitrary refusals to pay wages, and to induce prompt payment when payment is possible. Hence we conclude that the liability is not imposed regardless of the fault of the master or the owner, or his retention of any interest on the vessel from which payment could be made. It can afford no such protection and exert no effective coercive force where delay in payment, as here, *is due to the insolvency of the owner, and the arrest of the vessel, subject to accrued claims beyond*

[3] See, Note 2, supra.

its value. Together these obstacles to payment of wages must be taken to be sufficient cause to relieve from the statutory liability. The Trader, supra; *Feldman* v. *American Palestine Line, Inc.,* (D.C.) 25 F.2d 1002. Cf. *Gerber* v. *Spencer, supra.*" (emphasis added)

It is apparent that if at the time the demand is made the owner is insolvent and the vessel subject to accrued claims beyond its value, the owner or fund, is relieved from the statutory liability. Conversely, if when demand is made the owner is solvent and the value of the vessel exceeds the accrued claims, the seamen are entitled to penalties.

The meaning of the term insolvency may have different meanings in different contexts, but for the purpose of this case, the distinction given in *Collie* is the only one pertinent.

The facts present in *Collie* supported a finding that the owner was insolvent. The vessel was libeled for repairs. At the time of the seizure only two men were employed on board and their employment terminated when the vessel was seized. The other wage claimant had consented to the deferred payment because of the owners financial situation. Because all the accrued claims exceeded the value of the vessel and since the owner was in effect insolvent, the Supreme Court was reluctant to award statutory extra wages.

The *Collie* decision and the cases cited therein for holding that insolvency was sufficient cause to excuse payment, presented facts and circumstances quite different from the case at bar. In The Trader, 17 F.2d 623, 626 (E.D.S.C. 1926) the Court found that the corporation was "absolutely insolvent" and that when wages were demanded the situation was completely hopeless because the amount of claims surpassed the value of the vessel. The Court also found that "all efforts to obtain funds were exhausted." In *Feldman* v. *American Palestine Line, Inc.,* 25 F.2d 1002, 1003, (S.D.

N.Y. 1926) the wages could not be paid because the corporation and the vessel were taken over by a receiver in equity appointed by the Court. In The Acropolis, 8 F.2d 110 (E.D.N.Y. 1923) a petition in bankruptcy was filed against the owner and a receiver appointed, consequently he could not use available funds to pay wages.

On the other hand, in *Gerber* v. *Spencer*, 278 F. 886, 890 (9th Cir. 1922) the Court held that financial difficulties of the shipowner "did not relieve it from an obligation with respect to claim for wages, including extra pay". This holding was accepted by the Court in The Trader, supra, where it was said:

> "In this I am inclined to agree with them, and, if this case presented merely a question of financial difficulties, I should be disposed to allow the double wages. It is the duty of the master or owner to take steps to insure the prompt payment of wages, and, if financial difficulties were allowed to be a sufficient excuse, it would in many cases practically take away from the seamen their rights under the statute." (17 F.2d at p. 626)

[17] In the case at bar the evidence neither supports the conclusion that the owner was insolvent nor does it support a finding that at the time demand for wages was made the accrued claims surpassed the value of the vessel. The pleadings, documents and testimony before the court indicate that at the time of demand, the wages due were the only accrued claim. Some time thereafter, other claims against the vessel matured, but such claims cannot be retroactively applied to excuse payment of wages when due. Even at this stage of the proceedings there is no evidence of insolvency, nor that the accrued claims exceed the value of the vessel and even if there were such evidence it would not preclude this Court from awarding penalties. *Peterson* v. *S.S. Wahcondah*, 331 F.2d 44, 47-49 (5th Cir. 1964); on remand, 235 F.Supp. 698 (E.D. La. 1964).

[18, 19] The evidence does not suggest the possibility that the owner may have been in financial difficulties;[4] although, not even this situation constitutes sufficient cause to excuse payment. *Gerber* v. *Spencer*, supra. If mere financial difficulties were allowed to be sufficient excuse, it would in many cases practically take away from the seamen their rights under the statute. The Trader, supra; The Chester, 25 F.2d 908, 910 (D.C. Maryland 1928). In the absence of evidence this Court cannot conclude that the shipowner was in financial difficulties. The Great Canton, 299, F. 953 (E.D.N.Y. 1924).

[20-22] Tropical Commerce Corp. argues that default of the shipowner is equivalent to insolvency. This novel presumption unsupported by any authoritative decisions, would place the burden of overcoming the presumption upon the plaintiffs. Such a proposition is foreign to the American system of law and this Court will not tolerate a rule that would require the plaintiffs to prove that the shipowner was not insolvent. The burden of establishing this defense is on the party alleging it, *Butler* v. *United States War Shipping Administration*, 68 F.Supp. 411 (D.C. Pa. 1946); and, in the absence of a positive showing by said party, this Court concludes, on the evidence in this case, that the refusal to pay wages was "without sufficient cause."

Congress has seen fit to provide a penalty in favor of seamen whose wages are withheld without sufficient cause. This Court finds that the plaintiffs' wages were withheld without sufficient cause and it must enforce the Congressional mandate.

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[4] Clause 4 of time charter agreement, submitted in evidence by Tropical Commerce Corp. (Tropical's Exhibit #1), shows that the charterer was required to pay for the use and hire of said vessel at the rate of $17,500.00 (U. S. currency) per Calendar Month. If no charter hire is owed in accordance with Clause 4, then there was no excuse for failing to pay the wages due.

In view of the foregoing the penalty wages provided by 46 U.S.C.A. §596 are allowed and shall be computed from plaintiffs' Exhibit 3 and 4 and the testimony of the master.

It is so ordered.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

RICHARD A. PAYNE, ET ALS,

PLAINTIFFS

v.

SS TROPIC BREEZE,

DEFENDANT

AND

APOSTOLOS SAMADJAPOULOS,
NATIONAL WESTERN LIFE INSURANCE CO., INC.,

INTERVENORS

CIV. NO. 453-67

ORDER

The claim of the Intervenor, Apostolos Samadjapoulos, ex-master of the SS Tropic Breeze, came before this court for hearing on March 8, 1968, at which time he testified and presented documentary proof in support of his claim. The intervenor, National Western Life Insurance Company, hereinafter referred to as "National", the only party opposing the master's claim, presented no evidence, limiting itself to cross-examining the witness. Its request for a continuation of the hearing for the purpose of presenting proof contrary to the master's claim was granted by the court but such proof was never offered despite ample opportunity. On August 2, 1968, the case was finally taken under advisement by the Court, pending the filing of brief on questions of law which the parties considered pertinent. Previously, when the master filed his intervening complaint, National also objected but only to his claim for wages and travelling expenses. The issues raised by that objection were extensively argued and briefed by counsel and on September 26, 1967, the Court denied National's objections and allowed the master's interventions as to all

his claims. *Payne* v. *SS Tropic Breeze,* 274 F.Supp. 324, 328 (D.P.R. 1967). Although no objection was then made to his lien for advances, which could very well have been asserted then, the Court in the interest of justice and despite the master's claim of laches, will nevertheless, dispose of the controversy on the merits. Briefs were filed by both parties and the same have been considered by the Court. For the reasons expressed hereafter, the objection of National to the master's lien for advances is denied.

The gist of opposition to the master's lien for advances is twofold. First, it is contended that in view of the mortgage and notice prohibition exhibited on the vessel, the master had no authority to create maritime liens in favor of third persons; and consequently could not, by discharging those liens and making advances for necessaries, acquire a lien for himself. Secondly, the mortgagee claims that even though the Court finds the master had authority to create a lien for advances for necessaries and crew's wages, the preferred mortgage lien has priority over his lien for advances, except those to pay crew's wages, which item it appears to concede.

The evidence before the Court established the existence of a first preferred ship mortgage on the SS Topic Breeze. The master's claim for advances is asserted solely against the vessel in an *in rem* action and National's contention as to the master's inability to create maritime liens, other than for salvage and crew's wages, must be viewed in the light of applicable maritime law.

The mortgage involved herein contains the following prohibitory clause:

> "*Section 7.* Neither the Shipowner, any charterer, the Master of the Vessel nor any other person has or shall have any right, power or authority to create, incur or permit to be place or imposed or continued upon the vessel, its freights, profits or hire any lien whatsoever

other than for the crew's wages and salvage and the lien of this Mortgage."

The notice of mortgage which was kept on the vessel read:

"NOTICE OF MORTGAGE"

"This vessel is subject to a First Preferred Mortgage in favor of REGISTERED INVESTMENT, LTD. under authority of the Liberian Maritime Law. Under the terms of such First Preferred Mortgage, neither the Owner, any charterer, the Master of the Vessel nor any other person shall have the right, power or authority to create, incur or permit to be placed or imposed upon the vessel any lien whatsoever other than for crew's wages or salvage."

Despite the above mortgage prohibition, the master had statutory authority to create liens pursuant to Section 114 of Title 22 of the Liberian Code of Laws:

"(1) Whoever furnishes repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, to any foreign or domestic vessel upon the order of the owner or person authorized by the owner, shall have a maritime lien on the vessel."

"(2) The managing owner, ship's husband, master, or any person to whom the management of the vessel at the port of supply is entrusted including any such appointed by a charterer, owner pro hac vice or agreed purchaser in possession, shall be presumed to have authority from the owner to procure such necessaries, but a person tortiously or unlawfully in possession or charge of the vessel shall not have authority to bind it."

A Master is vested with similar authority under the American law. 46 U.S.C.A. §971 and 972. Thus, the Court is at the outset faced with the dilemma of whether Section 7 of the Mortgage and notice prohibition nullify the statu-

tory authority given to the master under the Liberian and American law, both of which apply to this controversy. An analogous conflict was faced by Judge Watkins of the District of Maryland in *Atlantic Steamer Supply Co.* v. *The Tradewind*, 144 F.Supp. 408, where a mortgagee sought to make a similar lien prohibition effective by invoking section 973 of the Ship Mortgage Act (46 U.S.C.A. 973). This section provides as follows:

"Section 973. Notice to person furnishing repairs, supplies, and necessaries

"The officers and agents of a vessel specified in section 972 of this title shall be taken to include such officers and agents when appointed by a charterer, by an owner pro hac vice, or by an agreed purchaser in possession of the vessel; but nothing in this chapter shall be construed to confer a lien when the furnisher knew, or by exercise of reasonable diligence could have ascertained, that because of the terms of a charter party, agreement for sale of the vessel, or for any other reason, the person ordering the repairs, supplies, or other necessaries was without authority to bind the vessel therefor. June 5, 1920, c. 250, §30, Subsec. R, 41 Stat. 1005".

After a review of the legislative history of the Act and of the judicial decisions interpreting it the Court at page 419 went on to hold:

"Accordingly, this court holds that Section 973 was enacted and re-enacted as an exception in favor of the vessel owner and deals only with the authority of a third person to represent the owner so as to create a lien. It does not prevent the creation of a lien as such (the status of the lien being another matter) against the vessel by an owner in favor of a supplier irrespective of the prohibitory terms of any mortgage covenant made by the owner to the mortgagee. To

hold otherwise would be to nullify the effect of other provisions of the Ship Mortgage Act, 1920, in that a ship's mortgage which failed to comply with the procedural requirements of the Act, necessary to achieve the status of a preferred mortgage, could nevertheless not only gain priority over the supplier's claim but would relegate it to a non-maritime status where the supplier knew, or with due diligence could have learned, of the terms of the mortgage."

Judge Watkins' holding was followed in *Rockfort Yacht Supply Co.* v. *M/V Contessa*, 209 F.Supp. 396 (S.D. Tex. 1962), *Empresa Nacional "El Cano" de la Mar. Mer.* v. *M/V Tropicana*, 252 F.Supp. 399 (E.D. La. 1965); and by this Court in this same case in the claim of Puerto Rico Drydock & Marine Terminals, Inc. (Unreported order of January 12, 1968).

The master's advances herein were mostly to pay crew's wages which by its terms the mortgage allows. Likewise, by discharging wage liens the master acquired by subrogation a lien of equal rank and priority. *The Cimbria*, 214 F. 128 (D.N.J. 1914); *Ruth and Marie* v. *Winifred*, 155 F.Supp. 37 (D. Mass.); *Pavlis* v. *Jackson*, 131 F.2d 362 (5th Cir. 1943), cert. denied, 318 U.S. 769; *The City of Camden*, 147 F. 847, 849-850 (S.D. Ala. 1906); *The Nisequoque*, 280 F. 174, 189-192; *The Ruth E. Merill*, 286 F. 355, 357, (2nd Cir. 1922); *The Ascutney*, 287 F. 991, 993 (D. Md. 1922); *Fielder* v. *Bay Coast Co.*, 5 F.2d 227, 228 (5th Cir. 1925); *The Bergen*, 7 F.2d 372-378 (S.D. Cal. 1925); *Findley* v. *Lamasa*, 276 F.2d 907 (5th Cir. 1960). The court holds that the master could create a maritime lien for wages. The advances to pay for necessaries to allow the vessels continued operation was also within the statutory authority of the master and was not precluded by the mortgage prohibition of Section 7. *Atlantic Steamer Supply Co.*, supra. National offered no

proof to show lack of authority. On the contrary, the record indicates that the master did in fact have such authority.

The Court concludes that the master was not impeded by the mortgage prohibition from creating maritime liens, for such necessaries as he was by law obligated to provide.

The priority of the liens other than for crew's wages presents the second issue of law which must be decided. It must be noted at the outset that the mortgage lien claimed by National is on a foreign vessel and thus its rights and priorities would have to be determined in accordance with the laws of the vessel's flag. However, since it has chosen to intervene in this admiralty proceeding, the priority of the parties has to be determined in accordance with the American admiralty law and with the applicable statutes.

National's right to intervene herein to foreclose its mortgage lien is made possible pursuant to the 1954 amendment of the Ship Mortgage Act of 1920, particularly Section 951 (46 U.S.C.A. 951), which in its pertinent part provides:

> "that such "preferred mortgage lien" in the case of a foreign vessel shall also be subordinate to maritime liens for repairs, supplies, towage, use of drydock or marine railway, or other necessaries, performed or supplied in the United States, June 5, 1920, c. 250, §30, Subsec. K, 41 Stat. 1003; June 28, 1954, c. 419, 68 Stat. 323".

Judge Watkins in the same decision of *Atlantic Steamer Supply Co., supra*, after a thorough research of the historical background to the amendment, in a well-reasoned opinion, concluded that Congress, by allowing foreclosure of foreign mortgages only intended to provide the mortgagee with a forum and expedient remedy but not to give him a priority not enjoyed by such mortgagee prior to the passage of the 1954 amendment. He went on to hold that of foreign ship mortgage does not have priority over American liemors, *Atlantic Steamer Supply Co.*, supra, at p. 420-421. The

extent and effect the amendment was to have upon approval by Congress was found by Judge Watkins after analyzing the Congressional record, from which he quotes extensively. Footnote 20, at page 421 of that opinion, is one quote taken from the Congressional record which this Court holds to be controlling on the issue at bar:

> ". . . . A proviso at the end of the bill provides that, in case of mortgages on foreign vessels, the mortgage lien shall be subordinated to maritime liens for repairs, supplies, towage, use of drydock or marine railway, or other necessaries. Under existing United States law, preferred mortgage liens on United States flag vessels come ahead of maritime liens for repairs, supplies and necessaries furnished subsequent to the mortgage liens. On the other hand, the bill improves the position of the holder of a mortgage on a foreign vessel, for under existing United States law he may only foreclose in an equity proceeding in the United States court and in such case the mortgage lien is subordinate to all maritime liens.
>
> The bill does not prejudice or destroy the substantive rights of an American mortgagee of a foreign-flag vessel. Such mortgagee can foreclose in a foreign court which acts independently of the Ship Mortgage Act, 1920, and secure the higher priority, if any, given the mortgage by the law of the foreign country. On the other hand, if the United States mortgagee wishes to foreclose in admiralty in the United States courts, he could do so under the bill and get the benefits of the simplified procedure not available to him under the existing law. Thus, while the bill does not give the holder of a mortgage on a foreign vessel the same preference or priorities as the holder of a mortgage on a United States vessel, it provides him an expeditious foreclosure proceeding and takes away no pro-

cedural or substantive right which he now has." (H. Rep. 1662, 83rd Cong. 2d Sess., p. 3)."

It is clear that the 1954 amendment to Section 351 created no higher priority or right than enjoyed by the mortgagee of a foreign vessel prior to its passage. Since such foreign mortgage lien, as distinguish from a mortgage lien on a United States vessel, was "subordinate to all maritime liens", *a fortiori*, its status is still the same, that is, subordinate to the maritime liens of American citizens. Apostolos Samadjapoulos is a citizen of the United States and his right to a lien for advances and disbursements is by now well settled. *U.S.* v. *The Pomare*, 92 F. Supp. 185, (D. Hawaii 1950); *Ex Parte Clark*, 8. Fed. Cas. 832, Case No. 2796 (P. Mass. 1843); *The Packet*, 18 Fed. Cas, 965, Case No. 10, 654 (D. Mass. 1823), Gilmore and Black, The Law of Admiralty, Ch. IX, § 9-20 pp. 512-513 and § 921, pp. 519-520.

In view of the decision of *Atlantic Steamer Supply Company, supra*, followed in *O'Brien Bros. Shipyard* v. *Hila*, 1959 AMC 117, the claim of Apostolos Samadjapoulos for advances and disbursements is given priority over the mortgage lien of National. The Court allows the master's lien for advances with priority over the lien of the mortgagee.

It is so ordered.

San Juan, Puerto Rico, 15 of October, 1968.

(s) HIRAM R. CANCIO

HIRAM R. CANCIO

Chief United States District Judge

APPENDIX D

United States Court of Appeals
For the First Circuit

No. 7313.

RICHARD A. PAYNE, et al.,
PLAINTIFFS,
v.
SS TROPIC BREEZE,
her engines, boilers, furniture, apparel, appliances, appurtenances, equipment, etc.,
DEFENDANT,
and
NATIONAL WESTERN LIFE INSURANCE COMPANY,
INTERVENOR-APPELLANT,
and
APOSTOLOS SAMADJOPOULOS,
INTERVENOR-APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

Before ALDRICH, *Chief Judge*,
McENTEE and COFFIN, *Circuit Judges*.

Richard C. Lewis for appellant.
Gustavo A. Gelpi, with whom *Harvey B. Nachman* and *Nachman, Feldstein, Laffite & Smith* were on brief, for Apostolos Samadjopoulos, appellee.

March 11, 1970.

McENTEE, *Circuit Judge*. The SS TROPIC BREEZE, a vessel of Liberian registry, was libeled *in rem* in Puerto Rico by members of its crew asserting claims for wages.

The Master, the present appellee, was permitted to intervene by the district court[1] in order to assert various claims against the vessel.[2] The owners of the vessel did not appear and the court ordered the sale of the ship. At that point, National Western Life Insurance Company (hereinafter National), an intervenor and assignee of a mortgage on the vessel, entered into a stipulation with the other claimants postponing the sale, agreeing to satisfy all claims which the court found had priority over its mortgage, and undertaking to pay into court funds sufficient to cover the Marshal's expenses and the crew's wage and penalty claims. The district court held that all of the Master's claims were superior to the mortgage and entered judgment against National for $10,944.85, plus interest.[3] National appeals.

Before dealing with the merits, we must dispose of the Master's contention that National waived its right to appeal when it entered into the stipulation postponing the sale. The language of the stipulation relied upon as constituting the waiver is as follows:

> "Intervenor National Western Life Insurance Company hereby agrees to deposit into the Registry of the Court the aggregate amount of all such other claims

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[1] 274 F.Supp. 324, 1968 A.M.C. 2389 (D. P.R. 1967), *rev'd in part on other grounds*, No. 7065 (1st Cir., filed May 28, 1969).

[2] The Master's claims, allowed by the district court and not questioned as to their amounts, are for (1) wages [$769.99]; (2) double wages under 46 U.S.C. § 596 [$839.88]; (3) travel expenses incurred in attempts to secure funds from the owners before the arrest of the vessel [$150]; (4) expenses incurred after the arrest of the vessel [$814.20]; and (5) disbursements for sundry expenses of the ship [$8,370.78].

[3] The wage and travel expense claims were disposed of at 274 F.Supp. 324, 1968 A.M.C. 2389 (D. P.R. 1967). The claim for disbursements was allowed in an unpublished order, Civ. No. 453-67 (D. P.R. filed Oct. 14, 1968). The claims for expenses while the ship was in *custodia legis* and for statutory double wages were allowed at 293 F.Supp. 425, 1969 A.M.C. 930 (D. P.R. 1968).

that the Court may find as having priority over the claim filed, as mortgagee, by said Intervenor, such deposit to be made within five (5) days after the Court's determination."

The Master contends that the undertaking to deposit the aggregate of prior claims within five days of the court's determination, without any mention of a delay pending appeal, indicates an intention that no appeal be taken. He draws support for this reading from a subsequent paragraph of the stipulation which explicitly noted that one of the intervenors, not a party to this appeal, signed without prejudice to an appeal from the order of sale, pending at the time of the agreement.

Assuming that an agreement to waive an appeal is enforceable,[4] we cannot agree that this stipulation constitutes such an agreement. To begin with, the language relied upon does not speak directly to the subject of appeals. It merely provides that the money be paid into court. No provision calling for the immediate distribution of the funds to the claimants is included. Therefore, there is nothing in the quoted paragraph, standing alone, to support the Master's reading. The presence of the paragraph reserving rights under a pending appeal by another intervenor does not alter our conclusion. The appeal referred to in that instance was pending at the time the stipulation was agreed to. There is no reason to infer that appeals on other issues, as to which there had been no rulings at the time, were intended to be waived. The intention to waive the right to appeal must appear clearly from the stipulation.[5] That condition is not satisfied here.

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[4] *United States Consol. Seeded Raisin Co. v. Chaddock & Co.*, 178 F. 577 (9th Cir. 1909), *cert. denied*, 215 U.S. 591 (1910); *Grumling v. Food Mach. & Chem. Corp.*, 151 F.Supp. 883 (W.D. S.C. 1957).

[5] *Kane v. Roxy Theatres Corp.*, 63 F.2d 754, 756 (2d Cir.), *cert. denied sub nom. New York Edison Co. v. Keech*, 289 U.S. 751 (1933).

This brings us to the merits. We pause, however, to deal with the issue of the law governing priorities among maritime liens and mortgages.

In casting their argument on this point in traditional choice-of-law terms, the parties seem to have misapprehended the nature of the question. The Ship Mortgage Act[6] establishes the relative priorities of foreign ship mortgages and other maritime liens. It is axiomatic that Congress has the power "to condition access to our ports by foreign-owned vessels upon submission" to our law, substantive and procedural. *Lauritzen* v. *Larsen*, 345 U.S. 571, 592 (1953). The crux of the matter, then, is whether Congress so intended the priority provisions of the Ship Mortgage Act. We conclude that it did.

Two factors are determinative of this result. The Act and its history leaves little room for doubt that Congress intended to have the Act apply to all foreclosures of foreign ship mortgages in American courts.[7] Moreover, such a reading of the statute is entirely consistent with general principles of maritime law — an important consideration under *Lauritzen* — because priorities among maritime liens have traditionally been regarded as governed by the law of the forum.[8] We therefore see no obstacle to the application of the Act in this case.

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[6] 46 U.S.C. §§ 911-24 (1964).

[7] *See generally* S. Rep. No. 1213, 83d Cong., 2d Sess. (1954); H.R. Rep. No. 1662, 83d Cong., 2d Sess. (1954); *Hearings on S. 2607 Before the Senate Committee on Interstate and Foreign Commerce*, 83d Cong., 2d Sess. (1954); *Hearings on H.R. 6276 Before the House Committee on Merchant Marine and Fisheries*, 83d Cong., 2d Sess. (1954).

[8] *Brandon* v. *SS Douton*, 302 F.2d 404, 410, 1962 A.M.C. 1730, 1738-39 (5th Cir. 1962); *The Estrada Palma*, 8 F.2d 103, 1925 A.M.C. 1040 (E.D. La. 1925); *The Ocoee*, 280 F. 987 (E.D. Va. 1922); *The Scotia*, 26 F. 907 (S.D. N.Y. 1886); *The Olga*, 32 F. 339 (S.D. N.Y. 1887); *The Graf Kist Trawler*, 8 F. 853 (D.S.C. 1881); Note, *Priorities of Maritime Liens*, 60 Harv. L. Rev. 826, 826 n.13 (1956); Note, *What Law Governs Maritime Liens*, 26 Harv. L. Rev. 356, 358 (1913); *see Harrison* v. *Sterry*, 9 U.S. (5 Cranch) 289 (1809).

The structure of the Ship Mortgage Act is as follows: a mortgage which meets certain statutory criteria[3] is deemed a "preferred mortgage" and constitutes a lien upon the vessel, enforceable *in rem*, and superior to all claims against the vessel except "preferred maritime liens," expenses and fees allowed, and costs taxed by the court. 46 U.S.C. §§ 951, 953(b) (1964). A "preferred maritime lien," insofar as is relevant to this case, is "a lien ... for wages of the crew of the vessel ...." 46 U.S.C. § 953(a)(2) (1964). In addition, the Foreign Ship Mortgage Act subordinates a mortgage on a foreign vessel to "maritime liens for repairs, supplies, towage, use of drydock or maritime railway, or other necessaries, performed or supplied in the United States." 46 U.S.C. § 951, cl. 2 (1964). In order to prevail, therefore, the Master must bring each of his claims within one of three categories: (1) a lien "for wages of the crew of the vessel"; (2) "expenses and fees allowed and costs taxed by the court"; or (3) a lien "for repairs, supplies, ... or other necessaries, performed or supplied in the United States." We deal with the claims seriatim.

Post-Arrest Expenses

Following the arrest of the vessel, the Master gave the crew $300 from his own funds to buy food, spent an additional $364.20 for airplane fare to enable a number of his crew members to fly to Baltimore, Maryland, to take up other employment, and travelled to New York, with the court's approval, to seek funds from the owners, at a cost of $150. The district court held that the Master's claims for reimbursement for the cost of food and crew member transportation had priority over all other claims, as expenses while the ship was in *custodia legis*, and allowed the travel expense claim as well. Those rulings were plainly correct.

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[3] The Master does not contend that National's mortgage fails to meet the statutory requirements.

Expenditures while a ship is in *custodia legis* do not give rise to maritime liens. However, the Supreme Court has held that a district court, sitting in admiralty, has the equitable power to give priority to claims arising from the administration of property within the court's jurisdiction.[10] This rule is plainly consistent with 46 U.S.C. § 953(b)(2) (1964).[11]

Travel Expenses

The Master also claims $150 for the expense incurred by him in travelling to New York in his first attempt to secure funds from the owner, which took place prior to the seizure of the vessel. In order to prevail on this item, all that need be shown is that the travel expenses were "other necessaries" under § 951,[12] as the Master's authority

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[10] *New York Dock Co.* v. *S.S. Poznan*, 274 U.S. 117 (1927).

[11] *See Empresa Nacional "Elcano" De La Marina Mercante* v. *M/T Tropicana*, 252 F.Supp. 399, 402 (E.D. La. 1965), *aff'd without consideration of the point sub nom. Tropicana Shipping, S.A.* v. *Empresa Nacional "Elcano" de la Marina Mercante*, 366 F.2d 789 (5th Cir. 1966); *Roy* v. *M/V Kateri Tek*, 238 F.Supp. 813, 1966 A.M.C. 1830 (E.D. La. 1965).

[12] The reasoning is somewhat elaborate. One who furnishes necessaries to a ship acquires a lien therefor. In this case, those providing the Master with transportation and incidents thereto acquired liens, if the services were necessaries. However, it is well established that one who advances money to a ship for the purpose of discharging lien claims inherits the liens discharged, including their rank, by subrogation. *Crustacean Trans. Corp.* v. *Atalanta Trading Corp.*, 369 F.2d 656, 659-70, 1967 A.M.C. 362, 366-67 (5th Cir. 1966); *Paulis* v. *Jackson*, 131 F.2d 362, 1943 A.M.C. 75 (5th Cir. 1942); *cert. denied*, 318 U.S. 769 (1943); *The Ruth E. Merrill*, 286 F. 335 (2d Cir. 1922); *The Bergen*, 7 F.2d 379, 1925 A.M.C. 1363 (S.D. Cal. 1925); *The Ascutney*, 278 F. 991 (D. Md. 1922), *rev'd on other grounds*, 289 F. 802, 1923 A.M.C. 412 (4th Cir. 1923); *The Cimbria*, 214 F. 128 (D. N.J. 1914); *The City of Camden*, 147 F. 847 (S.D. Ala. 1906); G. Gilmore & C. Black, The Law of Admiralty § 9-20, at 519 (1957); Note, *Priorities of Maritime Liens*, *supra* n. 9, at 532-33 (1956) (priority rule criticized); *see Findley* v. *Lamasa*, 276 F.2d 907, 1960 A.M.C. 1444 (5th Cir. 1960). The rule is applicable to a master as well as to third parties. *The Englewood*, 57 F.2d 319, 1932 A.M.C. 343 (E.D. N.Y. 1932). Therefore, if the services rendered to the Master in his

to subject the vessel to such a lien is not in dispute.[13]

In this connection, it is helpful to consider the background of the lien for necessaries in the general maritime law, as it antedated the passage of the statutory provisions in question by many years. The basic rationale has been well stated as follows:

> "It is usually for the advantage of all parties having an interest in a ship, whether such interest be in the nature of ownership or security, that she should be actively engaged in commerce and not left to rot in port. But to continue in active employment she must have supplies and services. To obtain them she must have credit. Admiralty law in most countries secures this for her by implying a maritime lien in favor of those who furnish such necessaries ...." Note, *What Law Governs Maritime Liens, supra* n. 8, at 356-57; *accord, The J. E. Rumbell*, 148 U.S. 1 (1893); *The St. Jago de Cuba*, 22 U.S. (9 Wheat.) 409 (1824).

In 1910, Congress passed the Federal Maritime Lien Act, 46 U.S.C. §§ 971-75 (1964), which conferred a maritime lien for "repairs, supplies, ... or other necessaries ...." — precisely the same language later employed in § 951. In construing that Act, courts often limited "other necessaries" to items *ejusdem generis* the preceding specific objects of liens — repairs, supplies, et cetera.[14] Over the years, however, the construction of "other necessaries" has broadened to the point where, according to one com-

travels were necessaries, they gave rise to maritime liens to which the Master, by advancing payment on behalf of the vessel, was subrogated.

[13] The district court ruled that the Master had authority to subject the vessel to the liens claimed in this case. National does not contest that holding.

[14] *See, e.g., The Muskegon*, 275 F. 348 (2d Cir. 1921); *The Majestic II*, 285 F. 91 (S.D. Fla. 1922); *The Penn*, 266 F. 933 (E.D. Pa. 1920), *aff'd without consideration of the point*, 279 F. 212 (3d Cir. 1922); 1 E. Benedict, Admiralty § 90 (Knauth 6th ed. 1940).

mentator, it includes almost any goods or services which are convenient or useful to the vessel.[15]

We think that a broad interpretation is more consistent with the purpose of the Act than the earlier, narrow approach. The principal concern is to keep the ship active, thereby facilitating the flow of commerce and protecting the interests of the owners and secured parties. The determination of what items constitute "other necessaries" must be made in light of this consideration. The appropriate test, therefore, is whether the goods or services in question were necessary to the continued operation of the vessel.

Measured by this standard, the Master's trip to secure funds, in the circumstances of this case, must be deemed a necessary. The TROPIC BREEZE was under an imminent threat of being arrested on the libel of its crew. An arrest promised to, and in fact did, terminate the voyage and jeopardize both the owner's and mortgagee's interests. Action reasonably essential to an effort to forestall such an occurrence, whether successful or not, is in furtherance of the underlying policy of the lien and the expenses incident thereto give rise to a maritime lien for necessaries.

We are supported in this view by Congress' apparent intention that the statute be read expansively. The lan-

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[15] Gilmore & Black, *supra* n. 12, at 543; *see also Stern, Hays & Lang, Inc.* v. *M/V Nili*, 407 F.2d 549, 1969 A.M.C. 13 (5th Cir. 1969) (services of advertising agency for cruise ship); *Colonial Press of Miami, Inc.* v. *The Allen's Cay*, 277 F.2d 540, 1960 A.M.C. 1598 (5th Cir. 1960) (printing supplies); *Allen* v. *The M/V Contessa*, 196 F.Supp. 649, 1961 A.M.C. 2190 (S.D. Tex. 1961) (cigarettes); *Walker-Shageth Food Stores* v. *The Bavois*, 43 F.Supp. 109, 1942 A.M.C. 211 (S.D. N.Y. 1942) (liquor for pleasure yacht); *The Artemis*, 53 F.2d 672, 1932 A.M.C. 195 (S.D. N.Y. 1931) (uniforms for yacht crew; taxi fare for conveying provisions to the vessel); *In re Burton S.S. Co.*, 3 F.2d 1015, 1925 A.M.C. 335 (D. Mass. 1925) (canal tolls where alternate route available); *The Susquehanna*, 3 F.2d 1014, 1923 A.M.C. 643 (D. Mass. 1923) (fumigation of passengers' baggage); *The Ascutney*, *supra* n.12 (master's taxi fare).

guage of § 951, cl. 2, as we have noted, is identical to that of § 971, which was adopted forty-four years earlier. The tendency to disregard the strict application of the *ejusdem generis* rule and to give the statute a broad reading was evident in 1954 when the relevant portion of § 951 was enacted. Congress' use of the § 971 language in the Foreign Ship Mortgage Act is strong evidence of its approval of the then-current judicial interpretation of that section and its intention that the new statute be similarly construed.[16] Moreover, the Foreign Ship Mortgage Act, while giving a foreclosure remedy to holders of foreign ship mortgages, was clearly intended to maintain the superior position of American suppliers of goods and services to foreign vessels.[17] A narrow construction of "other necessaries" would tend to work against this significant purpose of the legislation.

We conclude that the district court was correct in allowing a lien for these travelling expenses and in according it priority over the mortgage.

Wages, Double Wages and Disbursements

The balance of the Master's claims may be dealt with together, as the priority of each is dependent upon whether it is a preferred maritime lien under § 953(a)(2). Indeed, the question is even narrower, for the priorities turn on whether a master's wage claim, assuming it to be a lien, is a lien "for wages of the crew of the vessel ...."[18]

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[16] *See, e.g., Sherman* v. *Hamilton*, 295 F.2d 516 (1st Cir. 1961), *cert. denied*, 369 U.S. 820 (1962); *New York Credit Men's Adjustment Bureau, Inc.* v. *A. Jesse Goldstein & Co.*, 276 F.2d 886 (2d Cir. 1960); *cf. Interstate Natural Gas Co., Inc.* v. *FPC*, 331 U.S. 682 (1947).

[17] *See* authorities cited note 7, *supra*.

[18] This is obviously true of the Master's wage claim, which we assume, without deciding, constitutes a lien against the vessel by virtue of the application of Liberian law. His claim under 46 U.S.C. § 596 (1964) is similar, as that section provides that a sum due thereunder "shall be recoverable as wages in any claim made before

The term "crew" does not have a fixed meaning in the law. Rather, the scope of the phrase must be determined in light of general principles of maritime law and the policies sought to be promoted by the statute under consideration.

It will be observed that wage liens of the crew are accorded a highly favored position under the Act. They receive priority over preferred ship mortgages in spite of the overriding statutory purpose of protecting the security of holders of such mortgages.

This is entirely consistent with the status of seamen's wage claims under the general maritime law as applied by United States courts. The services of seamen are absolutely essential to the navigation of the vessel[19] and they

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the court . . . ." This language has been uniformly held to give rise to a maritime lien of the same rank as the simple wage lien. *Gerber* v. *Spencer*, 278 F. 886 (9th Cir. 1922); *Peterson* v. *S.S. Wahcondah*, 235 F.Supp. 698, 1965 A.M.C. 2433 (E.D. La. 1964); *The Trader*, 17 F.2d 623, 1927 A.M.C. 120 (E.D. S.C. 1926); *The Nika*, 287 F. 717, 1923 A.M.C. 409 (W.D. Wash. 1923); *The Chas. L. Baylis*, 25 F. 862 (S.D. N.Y. 1885); *Covert* v. *British Brig Wexford*, 3 F. 577 (S.D. N.Y. 1880) (British statute with similar language). Finally, the claim for disbursements depends indirectly upon the same question. The balance in favor of the Master depends solely upon his having paid the former master's wages. Although the Master may have a lien for disbursements, *see* Gilmore & Black, *supra* n. 12, at 513, such a lien is not a preferred maritime lien and would therefore be subordinate to a preferred mortgage. Hence, if the Master is to have priority on this item, it must be by way of the subrogation theory. Note 12, *supra*. Since the present Master's payment of that claim gave him the same rights as the former master, his claim for disbursements must be treated as a master's wage lien and its priority turns on whether the former master's claim was a lien "for wages of the crew of the vessel . . . ." (Alternatively, it might be argued that the Master's claim should be viewed as analogous to an action on an open account. In such an action, the items are not considered independently and the balance constitutes a single, indivisible liability. 1 Am Jur 2d, Accounts and Accounting §§ 4, 9 (1962). However, if we were to adopt that course, the Master would stand in no better position. At most he would be entitled to a lien for disbursements for the balance and such a lien is not a preferred maritime lien.)

[19] *See* 1 Benedict, *supra* n. 14, at 247.

have been in a particularly helpless position down through history. They have been treated, therefore, as wards of admiralty and their wages given priority over all other claims.[20] Never has this been more forcefully put than by Justice Gray, who stated that seamen's wages "are sacred liens, and, as long as a plank of the ship remains, the sailor is entitled, against all other persons, to the proceeds as security for his wages."[21]

Juxtaposed to the treatment of ordinary seamen is that of the Master. As early as 1828 it was regarded as settled that the master had no lien against the vessel for his wages.[22] Our attention has been called to no contrary holding in the intervening years. It was not until 1968 that Congress, after recognizing the ancient rule,[23] enacted legislation giving masters of American vessels liens for wages of the same rank and priority as seamen's wage liens.[24]

In view of this history, it is unlikely that the phrase in question was intended to include masters. Nothing was to

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[20] 4 Benedict, *supra* n. 14, at 282; Gilmore & Black, *supra* n. 12 at 514.

[21] *The John G. Stevens*, 170 U.S. 113, 119 (1898).

[22] *Drinkwater* v. *The Spartan*, 7 Fed. Cas. 1085, 1090 (No. 4,085) (D. Me. 1828); *accord*, *The Steamboat Orleans* v. *Phoebus*, 36 U.S. (11 Pet.) 175, 179 (1837); *Sheppard* v. *Taylor*, 30 U.S. (5 Pet.) 675, 710 (1831) (Story, J.); *Walker* v. *Woolsey*, 186 F.2d 920, 1951 A.M.C. 471 (5th Cir. 1951); *The Maret*, 145 F.2d 431, 1944 A.M.C. 1203 (3d Cir. 1944); *Burdine* v. *Walden*, 91 F.2d 321, 1937 A.M.C. 1149 (5th Cir. 1937); *The Grand Turk*, 10 Fed. Cas. 956 (No. 5,683) (C.C. N.Y. 1817); *Crain* v. *American Waterways Corp.*, 143 F.Supp. 256, 1956 A.M.C. 1806 (E.D. Pa. 1956); *The Aquia*, 72 F.Supp. 201, 1947 A.M.C. 1386 (E.D. S.C. 1947); *The Herbert L. Rawding*, 55 F.Supp. 156, 1944 A.M.C. 222 (E.D. S.C. 1944); *The Mariner*, 298 F. 108, 1924 A.M.C. 882 (D. Mass. 1924); *The M. Vandercook*, 24 F. 472 (D. N.J. 1885); 1 Benedict, *supra* n. 14, § 80; Gilmore & Black, *supra* n. 12, at 512-13; Note, *Priorities of Maritime Liens*, *supra* n. 8, at 529.

[23] S. Rep. No. 1079, 90th Cong., 2d Sess. (1968).

[24] 46 U.S.C. §§ 600-01, 606-08 (Supp. IV, 1968). The statute, even if retroactive, would not be helpful here, as it applies only to masters of American vessels.

be accomplished by such use of the term, as masters did not have maritime liens upon which the statute could operate. Their inclusion would have been meaningless.

It might be argued that although inclusion of masters would have been of no significance in the application of the Act to masters of American vessels, this was not necessarily so in the case of foreign vessels. American courts regarded the question whether a wage lien arose as controlled by the law of the flag (or, in some cases, the *lex loci contractus*) and recognized such liens when created by foreign law.[25] Hence, it could be argued that the statute should be construed to allow such foreign liens priority.

We think the Act cannot bear such a construction. The Ship Mortgage Act, until amended in 1954, applied only to American vessels. At the time the Act was passed, the only wage liens that might be enforced in an admiralty ship mortgage foreclosure proceeding were those of ordinary seamen.[26] Hence, for the rule contended for to prevail, we would have to conclude that the Foreign Ship Mortgage Act intended to confer rights upon masters of some foreign

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[25] *See, e.g., The Chusan*, 5 Fed. Cas. 680 (No. 2,717) (C.C. Mass. 1843); *The City of Atlanta*, 17 F.2d 308 (S.D. Ga. 1924); *The Yarmouth*, 1923 A.M.C. 729 (S.D. N.Y. 1923); *The Woudrichem*, 278 F. 568 (E.D. N.Y. 1921); *The City of Miami*, 265 F. 427 (D. Mass. 1920); *The Kaiser Wilhelm*, 230 F. 717 (D. N.J. 1916); *The Scotia*, *supra* n. 8; *The Olga*, *supra* n. 8; *Hatton* v. *The Melita*, 11 Fed. Cas. 827 (No. 6,218) (D. Md. 1880); Griffin, *The Federal Maritime Lien Act*, 37 Harv. L. Rev. 15, 24-25, 1923 A.M.C. 206, 214 (1923); Note, *What Law Governs Maritime Liens*, *supra* n. 8, at 358; *but see The Woodland*, 30 Fed. Cas. 501 (No. 17,977) (C.C. S.D. N.Y. 1878), *aff'd on other grounds*, 104 U.S. (14 Otto) 180 (1881).

[26] In 1854, the Supreme Court ruled that a ship mortgage was not a maritime contract and was therefore not within the admiralty jurisdiction. *Bogart* v. *The John Jay*, 58 U.S. (17 How.) 399 (1854). Therefore, ship mortgages could not be enforced in admiralty and mortgagees did not have rights *in rem* against the vessel until the enactment of the Ship Mortgage Act. Since that Act applied only to American vessels, the only wage liens enforceable in an admiralty foreclosure proceeding were those created by American law. *See* note 25, *supra*.

vessels which had not yet been extended to masters of American vessels and which were not in harmony with American maritime law. Such an intention should appear clearly, but there is nothing in the statute or the legislative history which even remotely suggests such a purpose.[27]

Aside from the absence of any indication of such legislative intent, the treatment of masters' wage liens must be viewed in historical context. While American courts recognized such liens when created by foreign law, their priority was controlled by the law of the forum[28] and they were not given the same high priority as those of ordinary seamen.[29] Thus, it would not have been inconsistent for Congress, presumptively aware of the status of foreign masters' liens on the courts, to exclude them from a high priority class.

In light of the foregoing considerations, we conclude that the term "crew," as used in § 953 (a)(2) was not intended to include the master of a vessel. Accordingly, even if the Master had valid maritime liens for wages, double wages under § 596, and disbursements — issues we do not reach — they were subordinate to National's mortgage, as they were not preferred maritime liens.

The judgment of the district court is affirmed insofar as it allows the Master's claims for cutodia legis and travelling expenses. It is reversed insofar as it allows the Master's claims for wages, statutory double wages, and disbursements, and the case is remanded to the district court for the entry of judgment in accordance with this opinion.

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[27] *See generally*, authorities cited note 7, *supra*.

[28] Authorities cited note 8, *supra*.

[29] *Burdine* v. *Walden*, *supra* n. 23; *The Hanna Nielsen*, 273 F. 171 (2d Cir. 1921); *The Estrada Palma*, *supra* n. 8; *The Edith*, 217 F. 300 (W.D. Wash. 1914); *The Laurel*, 113 F. 373 (D. Wash. 1902); Connor, *Maritime Lien Priorities: Cross-Currents of Theory*, 54 Mich. L. Rev. 777, 800 (1956); *see* authorities cited note 25, *supra*.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 7313.

RICHARD A. PAYNE ET AL.,

PLAINTIFFS, APPELLEES,

v.

M/V TROPIC BREEZE, ETC.,

APPELLEES,

NATIONAL WESTERN LIFE INSURANCE COMPANY,

INTERVENOR, APPELLANT.

ORDER OF COURT

Entered March 27, 1970

The petition for rehearing submitted this day may not be filed.

Local Rule 5 requires that a petition for rehearing "shall contain an introductory statement that the argument or matter was not presented before, together with an explanation why it was not."

The tendered petition fails to meet the direct requirement of this rule. In addition, by repeating former arguments it violates the rule's indirect, but clear, intendment.

The purpose of Local Rule 5 is to make clear to counsel that a party has one opportunity, and that the court does not propose to permit a second go-round simply because a party is disappointed. In the absence of conspicuous error, the court does not have time for such procedure.

By the Court:

(s) DANA H. GALLUP

Clerk.

APPENDIX F

ARTIC[redacted]III § 2, CONSTITUTION OF THE UNITED STATES:

"The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority; to all Cases affecting Ambassadors, other public Ministerial Consuls; - to all Cases of admiralty and maritime Jurisdiction; . . ."

ARTICLE XIV, *Treaty of Friendship, Commerce and Navigation, United States and Liberia*, U.S.T.S. No. 956, U.S. Stat. at L. vol. 54, p. 1739, 1745:

"The merchant or other private vessels and cargoes of one of the High Contracting Parties shall, within the territorial waters and harbors of the other Party in all respects and unconditionally be accorded the same treatment as the vessel and cargoes of that Party, irrespective of the port of departure of the vessel, or the port of destination, and irrespective of the origin or destination of the cargo."

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46 U.S.C. § 951:

§ 951. *Lien of preferred mortgage; foreclosure; jurisdiction; procedure; foreign ship mortgages*

A preferred mortgage shall constitute a lien upon the mortgaged vessel in the amount of the outstanding mortgage indebtedness secured by such vessel. Upon the default of any term or condition of the mortgage, such lien may be enforced by the mortgagee by suit in rem in admiralty. Original jurisdiction of all such suits is granted to the district courts of the United States exclusively. In addition to any notice by pub-

lication, actual notice of the commencement of any such suit shall be given by the libellant, in such manner as the court shall direct, to (1) the master, other ranking officer, or caretaker of the vessel, and (2) any person who has recorded a notice of claim of an undischarged lien upon the vessel, as provided in section 925 of this title, unless after search by the libellant satisfactory to the court, such mortgagor, master, other ranking officer, caretaker, or claimant is not found within the United States. Failure to give notice to any such person, as required by this section, shall not constitute a jurisdictional defect; but the libellant shall be liable to such person for damages in the amount of his interest in the vessel terminated by the suit. Suit in personam for the recovery of such damages may be brought in accordance with the provisions of subsection (c) of section 941 of this title.

Foreign ship mortgages: As used in sections 951-954 of this title, the term "preferred mortgage" shall include, in addition to a preferred mortgage made pursuant to the provisions of this chapter, any mortgage, hypothecation, or similar charge created as security upon any documented foreign vessel (other than a towboat, barge, scow, lighter, car float, canal boat, or tank vessel, of less than two hundred gross tons) if such mortgage, hypothecation, or similar charge has been duly and validly executed in accordance with the laws of the foreign nation under the laws of which the vessel is documented and has been duly registered in accordance with such laws in a public register either at the port of registry of the vessel or at a central office; and the term "preferred mortgage lien" shall also include the lien of such mortgage, hypothecation, or similar charge: *Provided, however,* That such "preferred mortgage lien." in the case of a foreign vessel shall also be subordinate to maritime liens for repairs, supplies, towage, use of drydock or marine railway,

or other necessaries, performed or supplied in the United States. June 5, 1920, c. 250, § 30, Subsec. K, 41 Stat. 1003; June 29, 1954, c. 419, 68 Stat. 323.

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46 U.S.C. § 953

§ 953. *Preferred maritime lien; priorities; other liens*

(a) When used hereinafter in this chapter, the term "preferred maritime lien" means (1) a lien arising prior in time to the recording and indorsement of a preferred mortgage in accordance with the provisions of this chapter; or (2) a lien for damages arising out of tort, for wages of a stevedore when employed directly by the owner, operator, master, ship's husband, or agent of the vessel, for wages of the crew of the vessel, for general average, and for salvage, including contract salvage.

(b) Upon the sale of any mortgaged vessel by order of a district court of the United States in any suit in rem in admiralty for the enforcement of a preferred mortgage lien thereon, all preexisting claims in the vessel, including any possessory common-law lien of which a lienor is deprived under the provisions of section 952 of this title, shall be held terminated and shall thereafter attach, in like amount and in accordance with their respective priorities, to the proceeds of the sale; except that the preferred mortgage lien shall have priority over all claims against the vessel, except (1) preferred maritime liens, and (2) expenses and fees allowed and costs taxed, by the court. June 5, 1920, c. 250, § 30, Subsec. M, 41 Stat. 1004.

Rule 40 (a), Federal Rules of Appellate Procedure:

"A petition for rehearing may be filed within 14 days after entry of judgment unless the time is short-

ened or enlarged by order. The petition shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present. Oral argument in support of the petition will not be permitted. No answer to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will ordinarily not be granted in the absence of such a request. If a petition for rehearing is granted the court may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case."

Rule 47, Federal Rules of Appellate Procedure:

"Each court of appeals by action of a majority of the circuit judges in regular active service may from time to time make and amend rules governing its practice not inconsistent with these rules. In all cases not provided for by rule, the courts of appeals may regulate their practice in any manner not inconsistent with these rules. Copies of all rules made by a court of appeals shall upon their promulgation be furnished to the Administrative Office of the United States Courts."

Rule 6, U.S. Court of Appeals for the First Circuit:

"A petition for rehearing shall contain an introductory statement that the argument or matter was not presented before, together with an explanation why it was not."

APPENDIX G

UNITED STATES DISTRICT COURT
DISTRICT OF THE CANAL ZONE
OFFICE OF THE CLERK OF COURT
Box 2006, Balboa Heights, Canal Zone
Box 1175, Cristobal, Canal Zone

LOIS E. HARRISON
CLERK OF COURT

CATHERINE R. ADAMS
CHIEF DEPUTY CLERK

May 12, 1970

Mr. Gustavo A. Gelpi
Attorney At Law
Box 2407
Old SanJuan, Puerto Rico
00903

In Re: Armando Ruiz Ares, et al
vs.
S. S. COLON - Civil 2830

Dear Sir;

In reference to the above case, it was the first of many cases filed against the vessel. The Court granted the Master and crew judgment for wages and repatriation. The record is quite lengthy with many Orders, but it boils down to the fact that the Court Ordered that the wages and repatriation be paid out of the proceeds of the sale of the vessel, and many of the other claims of other plaintiffs were only partially settled. The costs of keeping the vessel here in the Canal Zone and the fees for caretakers was fully settled also.

The sale price of the vessel was $71,000.00, and all of the claims totaled twice that, at least. After the sale, a few members of the new crew brought suit for wages. A bond of $2,000 was put up by the new master, and after a default was entered when the time expired for answering, the bond was used to pay off that claim. The name of the vessel was changed to S.S. FORTUNE after the cases were decided.

She is also listed under that name of S.S. Ocean Explorer.
If you need further information, please let us know.

Very truly yours,
Lois E. Harrison
Clerk of Court
(s) Robert G. Harrell
By: Robert G. Harrell
Deputy Clerk

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in the
Supreme Court
of the
United States

OCTOBER TERM 1970

No. 1674

APOSTOLOS SAMADJOPOULOS,
Petitioner,

vs.

NATIONAL WESTERN LIFE INSURANCE COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

Respondent has restated and restructured the questions presented by petitioner in order to present in an orderly fashion its argument that the petition should be denied.

I. DOES THE SHIP MORTGAGE ACT GOVERN THE PRIORITIES OF MARITIME LIENS IN THE FORECLOSURE OF A FOREIGN PREFERRED MORTGAGE?

A. THE SHIP MORTGAGE ACT IS CLEAR AND UNAMBIGUOUS.

B. THERE IS NO CONFLICT WITH OTHER DECISIONS.

C. THERE IS NO CONFLICT BETWEEN THE DECISION AND THE TREATY WITH LIBERIA.

II. IS RULE 6 OF THE RULES OF THE COURT OF APPEALS FOR THE FIRST CIRCUIT A VALID EXERCISE OF THE COURT'S DISCRETIONARY POWERS AND CONSISTENT WITH RULE 40 OF THE FEDERAL RULES OF APPELLATE PROCEDURE?

STATEMENT

Issue is taken with Petitioner's statement that "the validity of the claims or the amounts involved were not disputed" (p. 5)[1] by the mortgagee (Respondent). In fact, the mortgagee questioned the master's claims as a matter of law throughout the District Court proceedings including opposition to the master's leave to intervene and a

[1]Page references are to Petitioner's brief and appendix.

petition for rehearing and for reconsideration of the District Court's final judgment. The master's claims were based on records he himself prepared, so the mortgagee defended on the basis of the law and by cross examination of the master.

The remainder of Petitioner's Statement is not objected to.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I. THE SHIP MORTGAGE ACT GOVERNS THE PRIORITIES OF MARITIME LIENS IN THE FORECLOSURE OF A FOREIGN PREFERRED MORTGAGE.

A. THE SHIP MORTGAGE ACT IS CLEAR AND UNAMBIGUOUS.

The Ship Mortgage Act, 46 U.S.C. §§951-954, (the Act herein) by its 1954 amendment, provides that the term "preferred mortgage" shall include any mortgage on a foreign vessel if certain requirements are met. Petitioner has not questioned the District Court's finding that the mortgage in this case met these requirements and is covered by 46 U.S.C. Sec. 951 of the Act. The priority of various maritime liens in relation to a "preferred mortgage" is contained in 46 U.S.C. Sec. 951 and Sec. 953. Petitioner does not contend that the Act should not apply to this case. Rather, his contention is that the application of this law by the Court of Appeals conflicts with the Congressional intent in enacting the legislation.

Petitioner has failed to cite any evidence of legislative intent that is contrary to the decision of the Court of Appeals. Petitioner contends that the Act merely provides a forum in which to foreclose a foreign mortgage, but does not give the mortgage lien any priority over other maritime liens. The House Report[2] on this section of the Act states:

> " . . . the bill improves the position of the holder of a mortgage on a foreign vessel, for under existing United States law he may only foreclose in an equity proceeding in the United States Court and in such case the mortgage lien is subordinate to all maritime liens." (H. Rep. 1662, 83rd Cong. 2d Sess., p. 3; United States Code and Administrative News, Vol. II 1954 p. 2453)

Continuing the thought expressed above, the "improved position" of the mortgagee is that he is no longer "subordinate to all maritime liens," and therefore he must have priority over those liens not given priority by the Act. The House Report continues:

> "There appears to be no reason to include within the operation of the proviso liens arising from repairs and supplies furnished outside the United States, and thereby give a foreign repairman a priority which even under the laws of his own country might not be accorded him." (H. Rep. 1662, 83rd Cong. 2d Sess., p. 3; United States Code and Administrative News, Vol. II 1954 p. 2453).

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[2]The House bill passed in lieu of the Senate bill and the House Report is more comprehensive than the Senate Report.

Petitioner's contention that Congress did not intend for the Act to cause certain lien claimants to have a priority lower than a "preferred mortgage" is clearly erroneous.

Petitioner contends that the Act does not spell out the relative order of priorities in the case of a foreign mortgage. The applicable portions of the Act are reprinted at pages 69-71 of the Petition. The Act is so clear and unambiguous as not to admit of construction. The device used by the amendment to the Act to include foreign mortgages is to specifically include them in the term "preferred mortgage." Once included in this category of a "preferred mortgage," the remaining sections of the Act must apply to the foreign mortgage, thus providing the relative order of priorities applicable to this case.

B. THERE IS NO CONFLICT WITH OTHER DECISIONS.

Petitioner contends that the case at bar is in conflict with "decisions of this court and other Admiralty courts." The only conflict petitioner can point to is that the Court of Appeals applied United States law in this case, while the law of the flag has often been applied in prior cases dealing with *different* causes of action.

There have been two prior appellate decisions in which the question of priority between a foreign "preferred mortgage" and a traditional maritime lien has been directly before the courts. In *Brandon* v. *Denton*, 302 F.2d 404, 1962 A.M.C. 1730 (5th Cir. 1962), the court held that the lien of the mortgage had priority over the lien for fuel supplied to the vessel in Italy, despite the fact that under

Italian law the fuel lien had priority over the mortgage. In *Barnouw* v. *S.S. Ozark*, 304 F.2d 717 (5th Cir. 1962) cert.den. 371 U.S. 923, 83 S.Ct. 291, 9 L.Ed.2d 231, the court followed *Brandon, supra*, and held that the lien of a foreign "preferred mortgage" was superior to a traditional maritime lien established under Italian law for bunkers supplied to the vessel. In both cases, the priority of the liens was determined pursuant to the terms of the Act.

There is excellent precedent to support the decisions of the Courts of Appeal in *Brandon*, *Barnouw* and the case at bar. In *Harrison* v. *Sterry*, *5 Cranch* 289, 298, 9 U.S. 289, 298, 3 L.Ed. 104 (1809) this court held that:

> " . . . the right of priority . . . is . . . dependent on the law of the place where the property lies and where the Court sits which is to decide the cause."

In *The Scotia*, 35 F. 907, 910-11 (S.D.N.Y. 1888), it was held

> "Liens and privileges, when enforced in other countries than in those by whose laws they are created, are largely treated as remedies, and unless affecting foreigners alone, take rank according to the law of the forum."

And in one of the first cases to be decided under the Act, the court ruled that the question of priorities between a "preferred mortgage" and other maritime liens must be determined by the law of the United States, and that the Act supplied the relative lien priorities. *The Oconee*, 280 F.927 (E.D. Va. 1922). Clearly, all the reported cases

construing the Act support the decision of the Court of Appeals in the case at bar.

Petitioner appears to place his hope of establishing a conflict in this Court's decision in *Lauritzen* v. *Larsen*, 345 U.S. 571, 73 S.Ct. 921, 97 L.Ed. 1254 (1953). In *Lauritzen*, a Jones Act case, having nothing to do with maritime liens or their relative priorities, this Court discussed the various choices of law available and concluded that the law of the flag should govern the facts as established in that particular case. *Lauritzen* is an excellent authority for the proposition that the law of the flag should not automatically be applied in admiralty cases.

There is a vital distinction between the facts in *Lauritzen* and the present case. A reason given in *Lauritzen* for not applying the law of the forum was that the defendant shipowner was not in court voluntarily. This court stated:

> "Because a law of the forum is applied to plaintiffs who voluntarily submit themselves to it is no argument for imposing the law of the forum upon those who do not." 345 U.S. at 592.

In the case at bar, both petitioner and respondent were intervenors. Therefore they both voluntarily submitted themselves to the United States courts. Not only did the petitioner submit his claims voluntarily to the United States District Court, but one of his claims was for double wages pursuant to 46 U.S.C. Sec. 596. Therefore, the petitioner has taken inconsistent positions, invoking United States law in his claim for double wages and invoking Liberian law in seeking a lien for the wages of a master. And yet both claims grew out of the same transaction!

C. THERE IS NO CONFLICT BETWEEN THE DECISION AND THE TREATY WITH LIBERIA.

The alleged conflict with Article XIV of the Treaty of Friendship, Commerce and Navigation between the United States and Liberia has no basis since the master of an American flag vessel in 1967 would not have been entitled to a maritime lien for wages either. 46 U.S.C. Sec. 606, enacted in April, 1968, now gives a master the same lien for wages as a seaman. The legislative history of Sec. 606 stated that the statute was enacted to change the existing law which had uniformly denied the master a lien for wages. United States Code and Administrative News, Vol. II 1968- 90th Congress, Second Session, pp. 1889-90. In any event, there is no conflict between the decision of the Court of Appeals and the treaty with Liberia since the master in this case received the "same treatment" as to his wage claim as the master of an American vessel would have received in 1967.

In *Brandon* v. *Denton, supra*, an Italian lienor claimed that a similar treaty between the United States and Italy was in conflict with the 1954 amendment to the Ship's Mortgage Act. Justice Rives of the Fifth Circuit, in a case where there may have been some conflict between the treaty and the Act, cited *Tag* v. *Rogers*, 105 U.S. App. D.C. 387, 267 F.2d 664, 668 (1959), for the proposition that

> "Once a policy has been declared in a treaty or statute, it is the duty of the federal courts to accept as law the latest expression of policy made by the constitutionally authorized policy-making authority."

The Liberian treaty became effective in 1939, the amended Ship's Mortgage Act in 1954.

The case at bar is stronger in favor of respondent than *Brandon* v. *Denton* because here there is no conflict between the statute and the treaty.

II. RULE 6 OF THE RULES OF THE COURT OF APPEALS FOR THE FIRST CIRCUIT IS A VALID EXERCISE OF THE COURT'S DISCRETIONARY POWERS AND IS NOT INCONSISTENT WITH RULE 40 OF THE FEDERAL RULES OF APPELLATE PROCEDURE.

Rule 40(a) of the Federal Rules of Appellate Procedure allows a party dissatisfied with an opinion of the Court of Appeals to petition that court for rehearing. A rehearing is not a matter of right but is a question addressed to the sound discretion of the court. *Chapman* v. *Federal Land Bank*, 117 F.2d 321 (6th Cir. 1941); *Hooper* v. *Beecher*, 109 N.Y. 609, 15 N.E. 742 (1888); *Stevens* v. *Myers*, 91 Or. 114, 117 P. 37, 2 A.L.R. 1155 (1918); *Bridges* v. *United States*, 201 F.2d 254, 255 (9th Cir. 1952). Since the Court of Appeals has the discretion to grant or deny the petition, it should have the right to advise parties in advance of the basis upon which a petition for a rehearing will be considered.

Rule 47 of the Federal Rules of Appellate Procedure provides the authority for each circuit to regulate practice before it, provided such rules are not inconsistent with the Federal Rules. Petitioner contends that Rule 6 of the First

Circuit, which requires an introductory statement that the argument or matter was not presented before and why it was not, is in conflict with Rule 40(a) of the Federal Rules. Rule 40(a) does not give a party the right to a rehearing. Rather it merely sets forth conditions upon which a request for rehearing may be made.

An appellate court may adopt reasonable rules regulating the right to a rehearing. *Herndon* v. *Imperial F. Ins. Co.*, 111 N.C. 384, 16 S.E. 465 (1892); *Atlantic Greyhound Corp.* v. *Public Service Co.*, 132 W.Va. 650, 54 S.E.2d 169, 175 (1949). Petitions for rehearing

> "are to be filed only in unusual circumstances. In the absence of clear error they are not to be used to reargue matters already argued and determined . . . (nor) for the purpose of presenting matters which should have been, but without good cause, were not argued before . . ." *Local No. 1505 International Brotherhood of Electrical Workers* v. *Local Lodge No. 1836*, 304 F.2d 365, 367-8 (1st Cir. 1962) reh. den. 1962.

Rule 6 of the First Circuit is very similar to Rule 58(2) of the Rules of the Supreme Court, which limits petitions for rehearing on writs of certiorari to "grounds . . . confined to intervening circumstances of substantial or controlling effect or to other substantial grounds available to petitioner although not previously presented."

Therefore, Rule 6 of the First Circuit is not in conflict with Rule 40(a) of the Federal Rules of Appellate Procedure since it merely sets forth an established policy of the Federal courts that has always been within the discretionary powers of the courts.

CONCLUSION

The decision of the Court of Appeals is clearly in harmony with the previous cases, applicable statutes and treaties; and the decision being clearly correct, there is no basis pursuant to Rule 19 of the Rules of the Supreme Court for the issuance of a writ of certiorari. For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 242

APOSTOLOS SAMADJOPOULOS, PETITIONER

v.

NATIONAL WESTERN LIFE INSURANCE COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

On October 12, 1970, the Court invited the Solicitor General to express the views of the United States with respect to this case. Contrary to petitioner's position (Pet. 9), it is the conclusion of the United States that the decision of the Court of Appeals for the First Circuit does not conflict with Article XIV of the Treaty of Friendship, Commerce and Navigation between the United States and Liberia. Since the United States has no interest in or special experience with the other issues in the case, we limit our discussion to the treaty question.

409-675—70

1. The relevant facts, which are detailed in the opinions below and are set forth in the petition, may be stated briefly.

In 1967, members of the crew of the SS TROPIC BREEZE, a vessel of Liberian registry, filed in the United States District Court for the District of Puerto Rico a libel against the vessel based on claims for wages. Petitioner, the master of the TROPIC BREEZE, who also had a claim of wages, and respondent, the assignee of a mortgage on the vessel, were permitted to intervene in order to assert their respective claims. By stipulation of the parties, the sale of the vessel was postponed, and respondent agreed to satisfy all claims which the district court found to have priority over the mortgage.

The district court held that Liberian law governed the interpretation of petitioner's employment contract and that under that law the master of a vessel has the same maritime wage lien as seamen. Relying on *Lauritzen* v. *Larsen,* 345 U.S. 571, the court ruled that the law of the vessel's flag was controlling with respect to wage claims, and that accordingly the master's wage claim had priority over respondent's mortgage (see Pet. 27–28, 23–24).

The court of appeals reversed with respect to petitioner's claim for wages. It held that American law applied and that, in order to prevail, petitioner would have to show that he had a master's lien so as to come within the lien priorities in the Ship Mortgage Act, 46 U.S.C. 911–984. The court ruled that, under Ameri-

can law prior to 1968,[1] the master of an American vessel had no lien for his wages; that there was no reason to conclude that masters of foreign vessels had any greater rights but, even assuming that the master of a foreign ship had a maritime lien for wages under foreign law cognizable under principles of comity, this was not a preferred maritime lien and thus was subordinate to respondent's mortgage (Pet. 63–67).

2. Article XIV of the Treaty of Friendship, Commerce and Navigation between the United States and Liberia (U.S.T.S. No. 956, 54 Stat. 1739, 1745) states in pertinent part:

> The merchant or other private vessels and cargoes of one of the High Contracting Parties shall, within the territorial waters and harbors of the other Party in all respects and unconditionally be accorded the same treatment as the vessel and cargoes of that Party, irrespective of the port of departure of the vessel, or the port of destination, and irrespective of the origin or destination of the cargo. * * *

In contending (Pet. 9) that the decision below violates Article XIV of the treaty, petitioner assumes that the granting of liens upon a vessel and the ordering of their priorities constitutes "treatment" of the vessel under this provision. From this, petitioner argues that the treaty requires that the same liens, with the same priorities, be provided against Liberian flag vessels as are provided against United States vessels.

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[1] In 1968, the Act was amended to give masters of American vessels liens for wages of the same priority as seamen's wage liens. 46 U.S.C. (Supp. V) 606.

The Department of State has advised us that it disagrees with this interpretation of the treaty. In its view, the requirement in Article XIV that the foreign flag vessel be accorded the same treatment as national vessels "irrespective of the port of departure of the vessel, or the port of destination" indicates that the primary concern of the treaty is with laws affecting on-going shipping activity rather than the collection of debts arising out of such activity. Article XIV thus does not deal with wage liens and the "same treatment" concept it adopts is inapplicable to questions of lien priority. The Department of State has also advised us that the negotiating history of Article XIV and of similar provisions in other United States Friendship, Commerce and Navigation treaties bears out this interpretation. This history indicates that the principal purpose of the provision regarding treatment of vessels is to provide equality with respect to charges and regulations; there is no indication that the requirement of identical treatment was intended also to extend to the rights and remedies that might apply upon liquidation of debts against vessels. See, *e.g.*, Hawkins, *Commercial Treaties and Agreements*, pp. 34–44 (1951).

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

NOVEMBER 1970.

U.S. GOVERNMENT PRINTING OFFICE: 1970